ONTARIO
LABOUR RELATIONS BOARD
REPORTS

Annual
Consolidated Index 2006

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ONTARIO
LABOUR RELATIONS BOARD
REPORTS

A Bimonthly Series of Decisions from the Ontario Labour Relations Board

Annual
Consolidated Index 2006

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

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Adjournment – Certification – Construction Industry – Practice and Procedure – Related Employer – Sale of a Business – Unfair Labour Practice – The responding parties sought an adjournment of these proceedings because of a pending criminal trial involving the employer's representative and an employee – The responding parties argued that because of an Undertaking Given to a Peace Officer, the employer's representative was prohibited from "going to anyplace" the employee was to be (he was a potential witness in these proceedings) – Once the Board established that the employee was not in attendance, it ordered the employer's representative to appear at the hearing – The Board refused to adjourn its proceedings: first, there was no consent to the request; second, the Board gives priority to serious allegations of unfair labour practices; third, the personal concerns of the employer's representative do not attract the same level of concern as do the interests of the parties; fourth, the Board is not in a position to remedy conflicts of loyalties a person may have (between self-interest and the interests of the employer) – Matters referred to Registrar to set hearing dates

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Alteration of Jurisdiction – Construction Industry – Damages – Interim Relief – Practice and Procedure – Trade Union – Unfair Labour Practice – The Local complained that the International, without just cause and contrary to sections 147 and 149, altered the jurisdiction of the Local and placed it under supervision – The Local also complained that the International represented it in a manner that was arbitrary, discriminatory, or in bad faith – The Board determined that the matter required an expeditious resolution and that this could only be achieved through a consultation – In 2002, as the International restructured into Regional Councils, the Local voluntarily affiliated with GORC (which did not permit Locals to employ persons directly) and remained bound by the International's constitution – In 2005 a dispute arose between the Local and International when three Local officers either resigned or were dismissed from employment with GORC – The Local resolved to withdraw from GORC and remain autonomous; the International responded with an audit, a hearing and the placement of the Local under supervision – The Board first found that there was no alteration of jurisdiction by the International: the International in attempting to keep the Local in the GORC, was doing nothing other than giving effect to the jurisdiction voluntarily assumed by the Local – The Board next considered the four factors set out in s. 147(3) for determining whether the International had cause and found in favour of the International having had cause – Further the Board found the International had just cause to assume supervision of the Local – The Local had no legitimate justification for its secession from the International at the outset and the interests of the Local, as distinct from the interests of the individuals, were not impaired or put in jeopardy by the supervision or the process leading to the supervision – Applications dismissed, subject to the issue of whether damages were payable

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Bargaining Rights – Collective Agreement – Sale of Business – The applicant unions sought a declaration that there has been a sale of business from the former Ontario Hydro to the Independent Electricity System Operator ("IESO") – CUSW sought a declaration that the IESO thereby became bound by the bargaining rights held by CUSW for employees of the former Ontario Hydro and that CUSW is entitled to give notice to bargain to the IESO

– LIUNA similarly sought a declaration that the IESO became bound by various collective agreements binding LIUNA and the former Ontario Hydro as a consequence of the sale of business and are therefore entitled to give notice to bargain regarding those collective agreements – The IESO was established by the *Electricity Act (*E.A.*)* as a not-for-profit, non-share capital corporation through re-organizing the former Ontario Hydro – The applicant unions submitted that the IESO acquired the assets, liabilities, responsibilities and functions of the Central Market Operator ("CMO") business unit of the former Ontario Hydro and this unit was responsible for the electricity grid – The unions claim the IESO continued to perform that function, albeit in a different manner, following the enactment of the E.A. – The responding party submitted that the IESO is a brand new organization, which is independently involved in setting the market prices for electricity and also has responsibility to oversee the reliability of the electricity grid in Ontario – With respect to CUSW, the responding party contends that CUSW never had a collective agreement with the former Ontario Hydro or with the IESO and that CUSW made no claim for bargaining rights in a timely fashion – With respect to LIUNA, the responding party contends that LIUNA never sought to engage in collective bargaining with the IESO and that it was not clear to the IESO that LIUNA was asserting bargaining rights until after the mediation meeting – The Board held that, from a review of the E.A. and the Transfer Order there was a transfer or disposition from the former Ontario Hydro to the IESO meeting the first requirement of a "sale of business" – At issue was whether what was transferred to the IESO under the terms of the legislation can be characterized as part of the "business" of the former Ontario Hydro within the meaning of section 69 of the *LRA* – When the Board considered what is meant by "business" or part of a business in section 69, the Board looked at the essential elements of the given undertaking and whether a coherent grouping of those elements had been transferred – The factors the Board considers include; the absence of a hiatus in operations following the transfer, the extent to which the transferee derives its ability to carry on business following that which was transferred, and whether the transferor subsequently ceased to carry on business – The evidence before the Board showed that virtually all the assets and liabilities of the CMO business unit were transferred to the IESO, and there was little that changed in the day-to-day functions of the employees who were transferred to the IESO at the time of the de-merger – The Board held that the fact that the IESO carries out what is substantially the same responsibility in respect of reliability in a somewhat different manner does not imply that there has been a change in the character of the business following the transfer – The Board has recognized that there are inevitable changes in the manner in which a new entity will carry on business, particularly where only a part of a business of the predecessor has been transferred – The Board rejected the suggestion that, no sale of the business declaration should issue since there was no transfer of the construction part of the business of the former Ontario Hydro to the IESO to which the applicant bargaining rights apply – The Board further recognized that a period of apparent inactivity by a trade union asserting its rights will not necessarily indicate that the union has abandoned its bargaining rights, particularly where that period of inactivity occurs in a period in which there are no employees working in the bargaining unit – The Board found that neither CUSW nor LIUNA abandoned their bargaining rights in respect of the IESO, as alleged – The Board held the bargaining rights of CUSW and LIUNA continue in this new entity and IESO is bound to the collective agreements

ONTARIO ELECTRICITY FINANCIAL CORPORATION AND INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS ; LIUNA, LIUNA ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1059..... (July/Aug.) 594

Bargaining Rights – Construction Industry – Evidence – Practice and Procedure – Termination – When the IBEW objected to the evidence of employee wishes supplied by the applicant and the Board determined that only photocopies had been filed with the application, the applicant was able to produce the original document to overcome the objection since there were no other defects in the application materials – The Board held that one copy of the employees' wishes was adequate for multiple applications: it is not necessary for employees signing an expression of their wishes to stipulate the Board Area or sector of the construction industry in which they are working in order to make clear that they do not want to be represented any longer by their bargaining agent – The wording of the document providing evidence of the employees' wishes must be sufficient to show the intention – Matter continues

JLY ELECTRIC LTD.; RE ERNIE PICKARD; IBEW, LOCAL 105; IBEW CONSTRUCTION COUNCIL OF ONTARIO ..... (Sept./Oct.) 710

Bargaining Rights – Construction Industry – Termination – Voluntary Recognition – In this application by the Painters to terminate the Plasterers' bargaining rights under s. 66, Syntex was bound to the Painters' Provincial Collective Agreement (which covered, among others, drywall tapers), when it obtained a subcontract from a general contractor bound to a collective agreement with the Plasterers' requiring that plasterers' work only be subcontracted to companies in contractual relations with that union – After commencing work and employing drywall tapers, Syntex entered into a voluntary recognition agreement with the Plasterers – The Board held that when there are actual persons employed in the bargaining unit, the union must demonstrate that it was entitled to represent those actual employees – Although the Plasterers' could not show they were entitled to represent the employees in the bargaining unit on the applicable date, the Board noted it still had discretion under s. 66 to decide whether to terminate the bargaining rights – The Board, following *Penegal Trim*, found nothing to override the fundamental right of the employees of this particular employer to freely select their own union – The Board declared that the Plasterers' were not, at the time the voluntary recognition agreement was entered into, entitled to represent employees in the bargaining unit set out therein, and that the Plasterers' bargaining rights obtained by voluntary recognition with Syntex were terminated as of the date of the Board's oral decision – Application granted

R.P. SYNTEX WALLS SYSTEMS; RE IUPAT LOCAL 1891; RE OPERATIVE PLASTERERS' AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA LOCAL 124 ..... (Nov./Dec.) 823

Bargaining Rights – Discharge for Union Activity – Interim Relief – Remedies – Unfair Labour Practice – The union sought interim reinstatement pursuant to section 98 of an employee who, the union asserted, was an inside union organizer and was discharged for her organizing activity – The employer asserted that the employee was terminated due to her own misconduct (using profanity on the production floor) in accordance with its policies and procedures and without anti-union animus – The Board was satisfied that interim relief was necessary to prevent irreparable harm or to achieve other significant labour relations objectives, as her termination, as a supporter of the union and key inside organizer, may have a detrimental effect on the union's organizing drive – The Board was not concerned that the reinstatement of the employee could put the business at risk for the following reasons: the company did not immediately remove the employee from the workplace when it learned of the transgression, although it could have under its policy; the employee swore 4-5 times in four years, but only one time was it on the production floor and the company concedes that one instance of swearing on the

production floor does not always result in termination; and lastly, there was no suggestion that there had ever been a client complaint arising out of the employee's use of profanity – In regards to s. 98(3), where there are numerous and significant factual disputes, the Board stated that it must assess the two stories and ask itself whether it appears the conduct of the employer is (applying the Board's experience) that of an employer which is engaged in a process free of anti-union animus – The Board held that it did not appear that the employer's decision to discharge the employee was unrelated to her exercise of rights under the Act and reinstatement is therefore an appropriate remedy – Reinstatement and posting ordered

SITEL CUSTOMER CARE INC.; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ..... (July/Aug.) 625

Bargaining Unit – Certification – Construction Industry – Employee – The union sought to certify all construction labourers of the employer – The employees in dispute cleaned trailers at the worksite that contained lunchrooms, washrooms and offices – The employer argued its employees were engaged in "cleaning" and not "clean-up" and were performing the same work they would in a private residence or doctor's office – The Board refused to make the distinction urged upon it by the employer, finding that the cleaning of the construction trailers was a necessary support for the various trades on site – Certification granted

646849 ONTARIO LTD. C.O.B. AS MAGIC MAID CLEANING SERVICES ; RE LIUNA, LOCAL 1089..... (July/Aug.) 475

Bargaining Unit – Certification – Construction Industry – Employee – Status – The union applied to certify employees of the responding party in all sectors of the construction industry other than ICI – At the outset of the hearing, the parties agreed that the first issue to be dealt with was whether employees performing general landscape maintenance were working in the bargaining unit on the date of application – The employer sought to rely on a standard industry collective agreement which purported to include the work the employees were performing in the definition of construction work – The Board found that routine grounds maintenance at a site where no construction work was being carried out could not constitute "construction industry" work for purposes of the certification application – The Board held it could not look at the expanded definition of construction work in a collective agreement nor at landscaping industry practice to modify the Act or alter the scope of the provision of the Act pertaining to the construction industry – The employees in question were not properly on the list – Matter continues

HANK DEENEN LANDSCAPING LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (July/Aug.) 513

Bargaining Unit – Certification – Construction Industry – LIUNA applied for ICI certification and two weeks later made a non-construction industry application for certification with respect to the same employees – The Board addressed two preliminary issues: whether the applicant was entitled to file "overlapping" applications and whether the applicant must show that at least two persons were at work on the day of application in the ICI sector –With regard to the first issue, while the Board confirmed that the same employees are not normally entitled to be members of two different bargaining units in applications brought on the same day, the Board held that LIUNA's two applications filed on different days did not amount to an abuse of process – The Board found the asserted overlap was a consequence of Swift's contention that many of the employees in the

construction application did not perform construction work – With regard to the second issue, despite Swift's suggested alternate interpretation of s. 158(1), the Board found the section did not require at least two employees to be at work in both ICI and non-ICI sectors of the unit on the application date – The Board found this would contradict the statutory provision constituting both ICI and non-ICI workers as a single 'unit' for the purposes of the assessment of a certification application – Matter continues

SWIFT RAILROAD CONTRACTORS CORPORATION; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICAN ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Sept./Oct.) 741

Bargaining Unit – Certification – Construction Industry – Membership Evidence – Timeliness – After the two-day time limit under 128.1(3) had lapsed City Core filed a revised list that included three additional names – The union challenged the inclusion of two of these individuals, arguing City Core was statutorily prohibited from adding names after the two day time limit under 128.1(3) had lapsed – In regard to the third employee, the union did not challenge this employee's inclusion on the list as both sides had agreed he was to be included during a subsequent Regional Certification meeting – The Board found that City Core was prohibited from adding names to its list of employees after the expiry of the two day statutory period – The Board, however, permitted the inclusion of the third employee as neither party had challenged City Core's addition of this employee's name during the Regional Certification meeting and the Union would have been permitted to add the third employee to the list if City Core had not already done so – Matter continues

CITY CORE MECHANICAL LTD.; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 46 ..... (Sept./Oct.) 673

Bargaining Unit – Certification – Construction Industry – Sector Determination – Status – In this application for certification for a bargaining unit in all sectors in the construction industry other than the ICI, the status of five individuals was in dispute – Sector was a disputed issue and the Board considered for the first time whether the "majority of time" test from *Gilvesy* should apply to a consideration of sector – The Board noted that it took a "snapshot" of what occurred on the date of application to determine which bargaining unit an employee was employed in – The Board has used the majority of time test to determine which trade of work an individual was performing and also to determine into which geographic area an individual worked (see *Advance Tile and Carpet*) – The Board found there was no material or principled distinction between identifying the geographic scope in which the employee was working on the date of application and the sector – Accordingly it was appropriate to apply a majority of time test, where the unit applied for does not encompass all sectors, to assess whether the person falls within the applicable sector – The Board upheld the union challenges to four of the five individuals – Certificate issued

EASTWAY CONSTRUCTION LTD.; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ..... (May/June) 341

Bargaining Unit – Certification – Construction Industry – Status – In this application for certification, the Board considered the status of an employee on the date of application and whether, should there be a finding that he was a dependent contractor, he could be included in a bargaining unit of "traditional" employees in light of the provisions of subsections 9(5) and 152(2) of the Act – In concluding that the employee in question was

a dependent contractor and should be included in the bargaining unit, the Board held that there is a spectrum of work relationships where more or fewer of the various criteria pointing to employee or independent contractor status may be found – The Board found, however, that there was no need to distinguish between "traditional" employees and dependent contractors in a subsection 158(2) certification application, as the subsection mandates that both types of employees shall be included in one unit of employees, and that such unit shall be deemed appropriate for collective bargaining – Moreover, subsection 9(5) does not apply to subsection 158(2) due to the operation of section 126.1 of the Act – Accordingly, dependent contractors must be included in a single bargaining unit with other employees in a construction industry certification brought under subsection 158(2) of the Act – Application granted

GREENVILLA DEVELOPMENT GROUP INC.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .....(Jan./Feb.) 63

Bargaining Unit – Certification – Construction Industry – Status – On the application date the challenged individual, a salaried employee who worked as an estimator and sometimes on the tools, spent part of the day doing wiring work (bargaining unit work) and the remainder of the day determining whether an electric control system installed in part of the building could be extended – The Board first found that the work of determining whether the system could be extended was similar to preparing estimates and was not work in the construction industry – The Board next found that the evidence did not establish that the individual was engaged in bargaining unit work for the majority of the application day – Accordingly, the Board examined other relevant factors (reason for hire was as an estimator; the employee never spent the entire day on the tools; he no longer held a valid Certificate of Qualification; as a salaried employee, he was generally not required to record his hours) and concluded that he was not an employee in the bargaining unit on the application date – Certificate issued

EVERBRITE INDUSTRIES LTD.; IBEW, LOCAL 353 .....(Jan./Feb.) 36

Bargaining Unit – Certification – Employer – Representation Vote – In this application for certification, the employer gave numerically significant notice under s. 8.1 of the Act, arguing that workers supplied to it by an employment agency (Manpower) were in fact its employees – The union agreed that if the Manpower workers were found to be employed by Nike, the application would have to be dismissed because the union did not have the support of 40% of the bargaining unit – The Board considered the criteria articulated in *York Condominium* to determine the identity of the employer – The Board found that Nike bears the ultimate burden of remuneration; Nike has the authority to determine whether a temporary employee continues to work for it; although the employees were hired by Manpower, Nike can tell Manpower not to send back an employee; Nike has the power to dismiss; the degree of integration of the workers supplied by Manpower into Nike's business strongly points to Nike being the employer – Ultimately, the Board concluded that it is Nike which exercises fundamental control over the workers supplied by Manpower – Application dismissed under section 8.1(5)7 of the Act

NIKE CANADA LTD.; RE UFCW, LOCAL 1000A ..... (July/Aug.) 574

Bargaining Unit – Certification – The union brought an application for certification for all employees at three locations (in three different municipalities) of the responding party – The responding party submitted that there should be a separate bargaining unit for each of its three operations – Relying on the reasoning and criteria set out in *Hospital for Sick Children*, the Board held that the employer did not advance evidence of any serious

labour relations problems that would be caused by the Board acceding to the applicant's proposed unit – The majority of the employees at two locations have chosen to be represented by the applicant; the third location, with only one employee, would not be able to be certified without inclusion in the larger unit – With respect to the single employee's right to self-determination, the Board held that the employee's failure to file any representations led the Board to conclude that he was not opposed to union representation or the bargaining unit sought by the applicant – The Board held that the applicant's proposed bargaining unit was appropriate – Certificate issued

TORONTO REDI-MIX LIMITED AND GLOBAL READY MIX CONCRETE LTD.; RE TEAMSTERS LOCAL UNION NO. 230, READY MIX BUILDING SUPPLY, HYDRO AND CONSTRUCTION DRIVERS, WAREHOUSEMEN AND HELPERS ..... (July/Aug.) 639

Bargaining Rights – Employer Initiation – Termination – In this application for termination of bargaining rights, the union alleged that the employer had involved itself in the campaign, contrary to s. 63(16) of the Act – The union contended that: (1) the employer had knowledge of the application before it was delivered; (2) an employee in the human resources department made telephone calls to bargaining unit members to encourage their participation in the representation vote; and (3) the employer provided information to the applicant to enable him to send campaign literature to bargaining unit members – During the hearing, the employer conceded the first and third allegations, but submitted that neither constituted a violation of the Act – The Board considered all three allegations, holding that the employer's prior knowledge of the application was obtained innocently and the evidence of the employer's provision of employee information to the applicant was circumstantial and not compelling – With respect to the employee's phone calls to bargaining unit members, the Board could not conclude there was any evidence of improper comments – The union's objections were dismissed – Following the counting of the ballots, the termination application was successful

ONTARIO LOTTERY AND GAMING CORPORATION C.O.B. AS THE SLOTS AT FORT ERIE RACETRACK ; RE MICHAEL MCLELLAN ; RE OPSEU LOCAL 278 ..... (May/June) 300

Bargaining Rights – Sale of a Business – Related Employer – The union filed an application to extend their bargaining rights from Serco to Edwards Door Systems Limited (EDSL) – Serco closed down its installation and service work operation and entered into an "exclusive distributor" arrangement with EDSL for the sale and service of its equipment and warranty claims and the management of existing accounts - The union claimed that this arrangement was either a sale of business or it constituted associated or related businesses activities under subsection 1(4) – The sale of a business application was dismissed by the Board as there was nothing that could be identified as a business that was obtained from Serco – No assets, ongoing contracts or business relationships, organizational or managerial expertise and employees were transferred – With respect to the related employer argument, the Board did not find that there was any common control or direction – The exclusive distributorship did not amount to an instrument of control as EDSL was not obliged to do anything, and Serco was not controlled by EDSL - Application dismissed

SERCO CANADA LTD; AND/OR DOCK PRODUCTS CANADA INC., SPX CANADA INC. AND/OR EDWARDS DOOR SYSTEMS LIMITED; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRONWORKERS, LOCAL 700 ..... (Mar./Apr.) 290

Certification – Adjournment – Construction Industry – Practice and Procedure – Related Employer – Sale of a Business – Unfair Labour Practice – The responding parties sought an adjournment of these proceedings because of a pending criminal trial involving the employer's representative and an employee – The responding parties argued that because of an Undertaking Given to a Peace Officer, the employer's representative was prohibited from "going to anyplace" the employee was to be (he was a potential witness in these proceedings) – Once the Board established that the employee was not in attendance, it ordered the employer's representative to appear at the hearing – The Board refused to adjourn its proceedings: first, there was no consent to the request; second, the Board gives priority to serious allegations of unfair labour practices; third, the personal concerns of the employer's representative do not attract the same level of concern as do the interests of the parties; fourth, the Board is not in a position to remedy conflicts of loyalties a person may have (between self-interest and the interests of the employer) – Matters referred to Registrar to set hearing dates

NORTHLAND PROPERTIES CORPORATION; VANDALAY CONTRACTING INC.; RE LIUNA LOCAL 506 ..... (Mar./Apr.) 245

Certification — Bargaining Unit — Construction Industry – Employee – The union sought to certify all construction labourers of the employer – The employees in dispute cleaned trailers at the worksite that contained lunchrooms, washrooms and offices – The employer argued its employees were engaged in "cleaning" and not "clean-up" and were performing the same work they would in a private residence or doctor's office – The Board refused to make the distinction urged upon it by the employer, finding that the cleaning of the construction trailers was a necessary support for the various trades on site – Certification granted

646849 ONTARIO LTD. C.O.B. AS MAGIC MAID CLEANING SERVICES ; RE LIUNA, LOCAL 1089..... (July/Aug.) 475

Certification – Bargaining Unit – Construction Industry – Employee – Status – The union applied to certify employees of the responding party in all sectors of the construction industry other than ICI – At the outset of the hearing, the parties agreed that the first issue to be dealt with was whether employees performing general landscape maintenance were working in the bargaining unit on the date of application – The employer sought to rely on a standard industry collective agreement which purported to include the work the employees were performing in the definition of construction work – The Board found that routine grounds maintenance at a site where no construction work was being carried out could not constitute "construction industry" work for purposes of the certification application – The Board held it could not look at the expanded definition of construction work in a collective agreement nor at landscaping industry practice to modify the Act or alter the scope of the provision of the Act pertaining to the construction industry – The employees in question were not properly on the list – Matter continues

HANK DEENEN LANDSCAPING LIMITED ; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183..... (July/Aug.) 513

Certification – Bargaining Unit – Construction Industry – LIUNA applied for ICI certification and two weeks later made a non-construction industry application for certification with respect to the same employees – The Board addressed two preliminary issues: whether the applicant was entitled to file "overlapping" applications and whether the applicant must show that at least two persons were at work on the day of application in the ICI

sector –With regard to the first issue, while the Board confirmed that the same employees are not normally entitled to be members of two different bargaining units in applications brought on the same day, the Board held that LIUNA's two applications filed on different days did not amount to an abuse of process – The Board found the asserted overlap was a consequence of Swift's contention that many of the employees in the construction application did not perform construction work – With regard to the second issue, despite Swift's suggested alternate interpretation of s. 158(1), the Board found the section did not require at least two employees to be at work in both ICI and non-ICI sectors of the unit on the application date – The Board found this would contradict the statutory provision constituting both ICI and non-ICI workers as a single 'unit' for the purposes of the assessment of a certification application – Matter continues

SWIFT RAILROAD CONTRACTORS CORPORATION; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICAN ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Sept./Oct.) 741

Certification – Bargaining Unit – Construction Industry – Membership Evidence – Timeliness – After the two-day time limit under 128.1(3) had lapsed City Core filed a revised list that included three additional names – The union challenged the inclusion of two of these individuals, arguing City Core was statutorily prohibited from adding names after the two day time limit under 128.1(3) had lapsed – In regard to the third employee, the union did not challenge this employee's inclusion on the list as both sides had agreed he was to be included during a subsequent Regional Certification meeting – The Board found that City Core was prohibited from adding names to its list of employees after the expiry of the two day statutory period – The Board, however, permitted the inclusion of the third employee as neither party had challenged City Core's addition of this employee's name during the Regional Certification meeting and the Union would have been permitted to add the third employee to the list if City Core had not already done so – Matter continues

CITY CORE MECHANICAL LTD.; RE UNITED ASSOCIATION OF JOURNEYMEN AND APRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 46 ..... (Sept./Oct.) 673

Certification – Bargaining Unit – Construction Industry – Sector Determination – Status – In this application for certification for a bargaining unit in all sectors in the construction industry other than the ICI, the status of five individuals was in dispute – Sector was a disputed issue and the Board considered for the first time whether the "majority of time" test from *Gilvesy* should apply to a consideration of sector – The Board noted that it took a "snapshot" of what occurred on the date of application to determine which bargaining unit an employee was employed in – The Board has used the majority of time test to determine which trade of work an individual was performing and also to determine into which geographic area an individual worked (see *Advance Tile and Carpet*) – The Board found there was no material or principled distinction between identifying the geographic scope in which the employee was working on the date of application and the sector – Accordingly it was appropriate to apply a majority of time test, where the unit applied for does not encompass all sectors, to assess whether the person falls within the applicable sector – The Board upheld the union challenges to four of the five individuals – Certificate issued

EASTWAY CONSTRUCTION LTD.; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ..... (May/June) 341

Certification – Bargaining Unit – Construction Industry – Status – In this application for certification, the Board considered the status of an employee on the date of application and whether, should there be a finding that he was a dependent contractor, he could be included in a bargaining unit of "traditional" employees in light of the provisions of subsections 9(5) and 152(2) of the Act – In concluding that the employee in question was a dependent contractor and should be included in the bargaining unit, the Board held that there is a spectrum of work relationships where more or fewer of the various criteria pointing to employee or independent contractor status may be found – The Board found, however, that there was no need to distinguish between "traditional" employees and dependent contractors in a subsection 158(2) certification application, as the subsection mandates that both types of employees shall be included in one unit of employees, and that such unit shall be deemed appropriate for collective bargaining – Moreover, subsection 9(5) does not apply to subsection 158(2) due to the operation of section 126.1 of the Act – Accordingly, dependent contractors must be included in a single bargaining unit with other employees in a construction industry certification brought under subsection 158(2) of the Act – Application granted

GREENVILLA DEVELOPMENT GROUP INC.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .....(Jan./Feb.) 63

Certification – Bargaining Unit – Construction Industry – Status – On the application date the challenged individual, a salaried employee who worked as an estimator and sometimes on the tools, spent part of the day doing wiring work (bargaining unit work) and the remainder of the day determining whether an electric control system installed in part of the building could be extended – The Board first found that the work of determining whether the system could be extended was similar to preparing estimates and was not work in the construction industry – The Board next found that the evidence did not establish that the individual was engaged in bargaining unit work for the majority of the application day – Accordingly, the Board examined other relevant factors (reason for hire was as an estimator; the employee never spent the entire day on the tools; he no longer held a valid Certificate of Qualification; as a salaried employee, he was generally not required to record his hours) and concluded that he was not an employee in the bargaining unit on the application date – Certificate issued

EVERBRITE INDUSTRIES LTD.; IBEW, LOCAL 353 .....(Jan./Feb.) 36

Certification – Bargaining Unit – Employer – Representation Vote – In this application for certification, the employer gave numerically significant notice under s. 8.1 of the Act, arguing that workers supplied to it by an employment agency (Manpower) were in fact its employees – The union agreed that if the Manpower workers were found to be employed by Nike, the application would have to be dismissed because the union did not have the support of 40% of the bargaining unit – The Board considered the criteria articulated in *York Condominium* to determine the identity of the employer – The Board found that Nike bears the ultimate burden of remuneration; Nike has the authority to determine whether a temporary employee continues to work for it; although the employees were hired by Manpower, Nike can tell Manpower not to send back an employee; Nike has the power to dismiss; the degree of integration of the workers supplied by Manpower into Nike's business strongly points to Nike being the employer – Ultimately, the Board concluded that it is Nike which exercises fundamental control over the workers supplied by Manpower – Application dismissed under section 8.1(5)7 of the Act

NIKE CANADA LTD.; RE UFCW, LOCAL 1000A ..... (July/Aug.) 574

Certification – Bargaining Unit – The union brought an application for certification for all employees at three locations (in three different municipalities) of the responding party – The responding party submitted that there should be a separate bargaining unit for each of its three operations – Relying on the reasoning and criteria set out in *Hospital for Sick Children*, the Board held that the employer did not advance evidence of any serious labour relations problems that would be caused by the Board acceding to the applicant's proposed unit – The majority of the employees at two locations have chosen to be represented by the applicant; the third location, with only one employee, would not be able to be certified without inclusion in the larger unit – With respect to the single employee's right to self-determination, the Board held that the employee's failure to file any representations led the Board to conclude that he was not opposed to union representation or the bargaining unit sought by the applicant – The Board held that the applicant's proposed bargaining unit was appropriate – Certificate issued

TORONTO REDI-MIX LIMITED AND GLOBAL READY MIX CONCRETE LTD.; RE TEAMSTERS LOCAL UNION NO. 230, READY MIX BUILDING SUPPLY, HYDRO AND CONSTRUCTION DRIVERS, WAREHOUSEMEN AND HELPERS ..... (July/Aug.) 639

Certification – Charter of Rights and Freedoms – Practice and Procedure – Representation Vote – Standing – In this application for certification, the employer sought a declaration that the representation vote was void, that a new vote should be ordered, and that the Board either translate the ballots into Chinese and Punjabi, and/or allow the presence and use of an interpreter to assist the voters at the vote – Issues addressed were: does the employer have standing to raise arguments relating to the Charter in this case; did the Board violate sections 2(d) and/or 14 and/or 15(1) of the Charter in refusing to allow translated ballots or the presence of interpreters at the vote; if the Board did violate sections 2(d) or 14 or 15 of the Charter is it justified under section 1 of the Charter; did the Board violate section 5 and 6 of the Ontario Human Rights Code in refusing to allow translated ballots and the presence of translators at the vote – The Board saw no reason to allow standing in a situation of a long established practice where no employee raises the issue despite numerous notices posted – The Board also considered the other issues and was not persuaded that the vote, as carried out, had breached either the Charter or the Code – The Board held that the certification process and representation vote procedures are not protected activities under s. 2(d) – The Board held s.14 to only be available to parties or witnesses, and since the individual employees, on whose behalf relief was sought, were neither parties to this application nor witnesses, the section did not apply – The Board adopted the reasoning from R-Theta Inc. and found no breach of s.15 – Certificate issued

MAPLE LEAF CONSUMER FOODS INC.; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ..... (July/Aug.) 558

Certification – Collective Agreement – Timeliness – Three applications for certification were set down for hearing to determine whether any collective agreements existed between any of the applicants and Comstock, the responding party, at the intervenor's construction project – Two of the applicants (Millwrights and Carpenters) conceded their applications were untimely – The Labourers argued there was no collective agreement bar to their application – Comstock claimed it was bound by the collective agreement between the Labourers and the intervenor, Brighton Beach Power, because Comstock had signed a document (the Brighton Beach agreement) acknowledging that it had received a copy of the collective agreement between Brighton and the Labourers – The Board held that the

agreement between the Labourers and Brighton could not bind the Labourers to Comstock, without notice to the Labourers of an agreement to be bound or acceptance by the Labourers that Comstock was bound – Furthermore, just because Comstock was abiding by the terms and conditions of the collective agreement did not mean it was bound by it where Comstock was not a signatory to that agreement – There was no collective agreement bar to the application for certification by the Labourers – Matter continues

COMSTOCK CANADA LTD.; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO; RE BRIGHTON BEACH POWER LTD. ..... (July/Aug.) 501

Certification – Construction Industry – Employee – Membership Evidence – Practice and Procedure – Reconsideration – The employer requested reconsideration of the Board's decision to certify the union under s. 128.1 based on membership evidence filed by the union on behalf of more than 55% of the employees in the bargaining unit – The employer filed affidavit evidence, in which each affiant stated they had not signed a union membership card, from three of its five employees who were on the list of employees the Board considered when it made its certification determination – The allegations were specific, detailed and quite serious as they raised an issue of fraud or misrepresentation – The Board noted that at least one of the three affiants appeared to have signed a union membership card, however the Board did not disclose the degree of overlap between the membership evidence and the three affiants nor did it disclose the identity of the person or persons who appeared to have signed a card – The Board set the request for reconsideration down for hearing – Matter continues

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL. ..... (Nov./Dec.) 804

Certification – Construction Industry – Employee – Membership Evidence - Status – The responding party filed a timely response in this application for certification – The employer's primary position was that it had no employees in the bargaining unit because it was not the employer of the persons the applicant had sought to represent; it filed no names on its "Schedule A" – In the alternative, the responding party asserted there were seven more individuals than the four identified in the applicant's materials doing the same work on the application date; at the hearing the responding party sought to add the seven individuals to its "Schedule A" – The Board held that a responding party seeking to assert it is an employer of more individuals than the applicant has proposed must, pursuant to s. 128.1(3), provide the names of those individuals in a timely way, even if its submission relating to those individuals is an alternative position – Employer's motion to file the list of names after the two-day period set out in 128.1(3) dismissed – Matter continues

DESI'S ALUMINIUM CAMBRIDGE; RE CARPENTERS' UNION, CENTRAL ONTARIO REGIONAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA. ..... (Sept./Oct.) 700

Certification – Construction Industry – In this application for certification in the construction industry the responding parties did not file information specified under subsection 128.1(3) of the Act or a response within the required time limits – A letter was filed with the Board by Easton's after the two-day time limit stating that neither it nor the other responding party is the employer of the individuals described in the applicant's bargaining unit – The applicant argued that the Board was precluded from considering the information offered by Easton's because subsections 128.1(3) and (4) required such

information to be filed within the prescribed time limits, whereas the responding parties argued that the subsection does not apply to them in these circumstances because neither of them is an "employer" – The Board held that both statutory and labour relations policy support the conclusion that subsection 128.1(3) of the Act should not foreclose the Board's consideration of the information it deems appropriate in order to determine if a named responding party is the employer of those individuals working in the proposed bargaining unit – The Board further stated that the scope of the information required under subsection 128.1(3) of the Act does not include whether the entity named as a responding party is the employer – Accordingly considerations of this matter, where it is delivered beyond the time limits specified in Board Rule 25.5, depends on the exercise of the Board's discretion under Rule 40.7 – The Board held, given that Easton's letter was just a few days late and that the applicant did not allege it suffered any prejudice due to this delay, that it was prepared to extend the time limit for filing the responding parties' letter – Scheduled for hearing

EASTON'S GROUP OF HOTELS INC. AND 1406284 ONTARIO INC.; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ..... (July/Aug.) 508

Certification – Construction Industry – Membership Evidence – Practice and Procedure – The Board decided after examining the membership evidence that the dates on which the cards were signed should be disclosed for the following reasons: the information was arguably relevant; the pattern of dates on the cards was not likely to distort any party's presentation of its case; and, given that the Board might draw some conclusions from having looked at the dates, natural justice required that the parties be entitled to the information in order to make submissions – Finally, the Board refused to disclose the total number of cards in the application, since such disclosure would open the door to changes of position based on the perception of the likely strength of the union rather than a desire to identify which employees are actually in the appropriate bargaining unit

PRE ENG CONTRACTING; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH CHRISTIAN LABOUR ASSOCIATION OF CANADA ..... (May/June) 407

Certification – Construction Industry – Practice and Procedure – Reconsideration – Broccolini Construction asked the Board to reconsider its decision to certify a unit of carpenters and carpenter's apprentices – Broccolini did not file a response to the application for certification when it first received the application, mistakenly believing the certification application only applied to a subcontractor under its employ – Broccolini did not forward the certification application materials to the subcontractor – Following the issuing of the certificate, Broccolini filed a reconsideration application and sought to litigate the issue before the Board, alleging it was not the employer of the employees on the certificate – The Board found there was a heavier burden of persuasion on a party seeking reconsideration where a certificate has been issued and questioned why Broccolini had made no effort whatsoever to respond to the initial certification application – Consequently, the Board declined to reconsider its decision to certify the union

BROCCOLINI CONSTRUCTION (ONTARIO) INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 ..... (Sept./Oct.) 667

Certification – Construction Industry – Practice and Procedure – Reconsideration – Having failed to file a response or the information required under s. 128.1(3) within the time

stipulated, the employer asked the Board to reconsider its decision certifying the applicant on the basis that the applicant did not deliver a copy of the application to the employer – Although a successful facsimile transmission report was entered by the union, the employer argued that the 58 page transmission never came to the attention of the employer – The Board found that in the absence of any record from the employer's facsimile machine to suggest that no transmission was received, the evidence established that the application was received – The risk falls on the employer to keep adequate track of facsimiles received – Therefore the Board found the delivery effective – Request for reconsideration dismissed

GLASBAU HAHN GMBH + CO. KG; RE CENTRAL ONTARIO REGIONAL COUNCIL CARPENTERS, DRYWALL AND ALLIED WORKERS, CJA ..... (Mar./Apr.) 154

Certification – Construction Industry – Practice and Procedure – Reconsideration – Status – During the hearing of status disputes in this application for certification, the applicant sought to admit a cleaning contract that would indicate one of the witnesses was cleaning a certain residence at the time of certification – The witness had already concluded her testimony and had claimed she did not clean the residence in question – The respondent objected to the admissibility of the contract on the basis of the rule in *Browne v. Dunn* and the Board sustained the objection – At the next hearing date, the applicant sought reconsideration of the procedural ruling – The Board considered the rule's proper application in the certification context: at no time had the applicant introduced the evidence during cross-examination of the witness; the document was not relevant to any issue other than impeaching the witness' testimony; the contract went to the essential issue of whether the witness was performing bargaining unit work on the date of application – Finding the rule applied, the Board held that serious prejudice would be caused by allowing the contract to be entered into evidence: the applicant would be allowed to split its case and the already two-year-old application would be further lengthened, thereby compromising the efficiency of the Board's certification process – In contrast, the prejudice suffered by the applicant was minimal – Although not determinative of the matter, the Board also noted that the applicant had failed to follow Rule 8.3 of the Board's Rules of Procedure – Having regard to the purpose of the Act and labour relations principles, the Board confirmed its original ruling that the evidence was inadmissible – Reconsideration denied; matter continues

JOHN BODDY DEVELOPMENTS LTD.; RE LIUNA LOCAL 183 ..... (May/June) 360

Certification – Construction Industry – Practice and Procedure – Reconsideration – The Board was asked to reconsider its certification of the applicant by employees who did not receive notice of the certification application from either the employer or the union – Even on the employees' best case the Board would still have certified the applicant – Therefore, the failure to provide the notice to employees would not have affected the Board's decision – Reconsideration request dismissed

CARLETON IRON WORKS CO. LIMITED; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 765 ..... (Jan./Feb.) 15

Certification – Construction Industry – Practice and Procedure – The applicant filed its application for certification by Priority Courier on a Saturday, including a signed but incomplete Declaration Verifying Membership Evidence (Form A-74) – The applicant corrected its error by filing a completed Form on Monday – The Board found that both

the application and the Form arrived at the Board on the same day, although they were filed on different days – There was no prejudice to the responding party, so the Board exercised its discretion to relieve against the technical violation of Rule 25.1 (duty to file all documents with the application) – Certification granted

BALKO DRYWALL INC ; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 ..... (Mar./Apr.) 130

Certification – Construction Industry – Practice and Procedure – Reconsideration – PRW requested reconsideration of the Board's decision certifying the applicant on the basis of only the information provided by the applicant, as PRW had failed to file its response in a timely manner as required by s. 128.1(3) – Since PRW's allegations, if true, meant there would be only one employee in the bargaining unit, it argued that the applicant's information "misrepresented" the bargaining unit and the Board should exercise its discretion to consider the information under s. 128.1(5) – The Board found that misrepresentation must include some additional element or aspect that could not have been addressed by the provision of information in the normal course by the employer under s. 128.1(3), otherwise common construction industry status disputes could be characterized as misrepresentations – Additionally the Board noted that PRW had not alleged any wrongdoing by the applicant through the statements filed – Request for reconsideration dismissed

PRW EXCAVATING CONTRACTORS LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Mar./Apr.) 274

Certification – Construction Industry – Practice and Procedure – Unfair Labour Practice – In response to the union's application for certification, accompanied by a request for relief under section 11, the employer provided a materially significant 8.1 notice – The union asked that no representation vote be held (notwithstanding a finding of not less than forty percent of the individuals in the bargaining unit proposed in the application) until its s. 11 relief was determined, however the Board found that s. 8(2) requires that a representation vote be taken – Finally, although the employer consented to the counting of the ballots, given that the union had sought a delay in the representation vote, the Board was uncertain whether the union consented to the ballots being counted and ordered the ballot box sealed until the Board so orders or the parties agree – Matter continues

EAST ELGIN CONCRETE FORMING LIMITED ; RE LIUNA LOCAL 1059. ..... (Sept./Oct.) 706

Certification – Employer Support – Representation Vote – Trade Union – In this application for certification the Board considered whether section 15 of the Act was contravened, that is whether the employer provided financial or other support to the applicant – The Board concluded that the Association was precluded from becoming certified for the following reasons: the Association's sole source of start-up and ongoing operating funding was the employer; no dues deductions were authorized; it was not relevant whether the funding was provided directly or indirectly by the employer as it was still financial support; the employer provided free office space, a significant amount of relief time, and paid for all arbitration proceedings; and the Association's membership was limited to non-union employees holding permanent positions thus giving management control of membership through its hiring decisions – All of this amounted to improper employer support – Application dismissed

UNIVERSITÉ D'OTTAWA RE : ASSOCIATION DES EMPLOYE(E)S DE

L'UNIVERSITE D'OTTAWA [AEUO]. ..... (May/June) 444

Certification – Fraud – Membership Evidence – In this displacement application for certification, the incumbent (CHCW) alleged that the applicant (SEIU), in gathering and submitting membership evidence, had engaged in conduct that amounted to fraud – The Board held that a challenge to membership evidence can only be considered in the context of s. 64 of the Act – The allegations were: (a) an SEIU organizer told employees union membership was a condition of employment; (b) some membership applications were received by mail but bore "witness" signatures; (c) the Board's Form A-4 did not disclose that certain cards were mailed in, nor did the declarant or his collectors make the appropriate inquiries of the signatories; and (d) some employees sought the return of their SEIU memberships but the union refused – The Board reiterated its longstanding distinction between a party's misrepresentations to employees and those made to the Board – Only the latter constitute fraud on the Board and only in circumstances where the misrepresentations were false and the Board relied on them – Allegations (a), (b) and (d) did not amount to fraud on the Board. Nor did the omission regarding mailed-in cards – With respect to the failure to make appropriate inquiries and CHCW's evidence of three individuals who asserted they had not been asked about their membership cards, the Board held that this was insufficient evidence to deny the holding of a representation vote and in any event the vote was an expression of the true wishes of the employees – Furthermore, there were no allegations that any of the cards had not been signed by the actual employees – Certificate issued

OAKWOOD RETIREMENT COMMUNITIES INC.; RE SEIU LOCAL 1.ON; RE CANADIAN HEALTH CARE WORKERS (CHCW)..... (Mar./Apr.) 262

Certification – Intimidation and Coercion – Standing – Unfair Labour Practice – The employer filed an unfair labour practice complaint, alleging that the responding party (CAW) intimidated its employees into voting in favour of the CAW during the representation vote – The applicant requested that the CAW's certification application be dismissed or that the Board order a second representation vote – The CAW argued that the applicant did not have standing to bring the application; in the alternative that it had waived its right to do so; and finally that no *prima facie* case had been pled in respect of intimidation or coercion – With respect to the first issue, the Board found that the applicant had standing to bring its s. 96 application – The applicant was a party to the certification application, and therefore had a right to make submissions to the Board – On the second issue, the Board held that the applicant did not waive its right to bring a complaint – A waiver of the right to request another representation vote or of the right to request that the Board dismiss the application could only be triggered by an agreement between the two parties that the certification application be dismissed or that a final certificate be issued – Because there was no agreement, there was no waiver – On the final issue, the Board found that there were insufficient facts pled by the applicant to dismiss the certification application or to order a second representation vote – The Board noted that voters are reasonable and possessed of critical faculties, which enable them to recognize election propaganda for what it is – Further, the Board held that a reasonable voter would understand that the secrecy of the ballot boxes assures the integrity of the expression of voters' wishes – Even if the employer's allegations of intimidation and coercion were proven, the actions of the CAW did not result in the employees being deprived of the ability to express their true wishes – Application for certification granted – Section 96 application remitted back to the parties

MEWS CHEVROLET LTD.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA

(CAW-CANADA) ..... (Mar./Apr.) 187

Certification – Judicial Review – Practice and Procedure – Reconsideration – The Board certified the union pursuant to s. 128.1 after the City failed to file its response within the time stipulated by the Act and the Board's Rules – The City applied for reconsideration of the Board's decision on the main ground that the union improperly delivered its application to the wrong facsimile number – The union alleged that it received the facsimile number from the assistant to the City's Supervisor – The Board found that an organization bears the risks that comes with how it receives or handles faxes in the ordinary course of business, however if the City disputed the assertion that the union received the facsimile number from the Supervisor's assistant, it must make submissions on this to the Board – The Board dismissed the request for reconsideration, subject to receiving information from the City with respect to the assistant [Editor's note: no additional submissions were made by the City] On a motion by the union to strike all or parts of an affidavit sworn in support of the judicial review application, the court noted that there are rare and exceptional cases for the admission of an affidavit on an application for judicial review in circumstances where the content of the affidavit was not before the Board – In these circumstances however, the court concluded that the City was correct in its assertion that its affidavit properly provided evidence that may establish the Board's denial of natural justice to the City, and given the precedent for the admission of affidavit evidence to show denial of natural justice, the court found the City was entitled to establish its case through this evidence – Motion to strike dismissed [Editor's note: Motion to Appeal has been filed]

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD ..... (Sept./Oct.) 755

Certification – Membership Evidence – Practice and Procedure – After a certification vote where sixteen of eighteen ballots were cast in favour of the union, the employer repeated in its post vote submissions the allegations in its response: namely that two union organizers had come to the employer's office and stolen a contact list of current employees, which had been used for the purpose of contacting the employees during the organizing drive – The employer asked the Board to dismiss the application pursuant to its discretionary powers contained in section 23(1) of the *Statutory Powers and Procedure Act* arguing that the union's actions amounted to an abuse of process since the application for certification was the 'poisoned fruit' of the illegally obtained list – The Board noted that section 8(9) of the Act precluded the Board from having regard to allegations of this nature when disposing of an application for certification – The Board noted there was no allegation that the union's membership evidence was either false or misleading, nor were there any allegations that misrepresentations had been made to any employees – While the Board recognized that the union's alleged actions may have compromised the trust between the union and employer, employees' access to trade unions and collective bargaining are central purposes of the Act – The Board found there was no basis upon which to decline to grant the application for certification – Certification granted

CARE2000 HEALTH SERVICES ; RE SERVICE EMPLOYEES INTERNATINAL UNION LOCAL 1 ..... (Nov./Dec.) 785

Certification – Practice and Procedure – Status – In order to determine status disputes about whether certain employees were employed "in, at and out of" a certain address, the Board directed particularized "will say" statements and at the hearing into the matter asked

additional questions to clarify some of the statements made – The Board found that where employees work at or out of more than one site, for the purposes of determining whether they fall within a bargaining unit encompassing only one of those sites the Board considers to which site the employee has the greatest attachment – While the employees at issue sometimes worked "out of" the specific address, they were not primarily attached to this address – Matter continues

RAINBOW CONCRETE INDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOAL 793 ..... (May/June) 409

Certification – Practice and Procedure – The union sought an out-of-province summons and a certificate in accordance with the *Interprovincial Summons Act* – The Board was satisfied that pursuant to that Act and the Board's own powers under clause (c) of subsection 111(2) of the *Labour Relations Act, 1995* it has the authority to enforce the attendance of a witness in the same manner as a civil court – The Board was not persuaded, however, that its power extended to the issuance of the certificate pursuant to s. 5 of the ISA – Matter continues

3469051 CANADA INC.; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ..... (Nov./Dec.) 759

Certification – Practice and Procedure – Two timely displacement applications were filed with the Board on the same day – In the Teamsters' application, the employer disputed the union's estimate of the number of employees in the proposed bargaining unit, and gave notice under s. 8.1 – The Board was unable to determine whether the Teamsters had the requisite 40% membership – A three-way vote was ordered, with the box sealed pending the outcome of the s. 8.1 challenge – Vote ordered

WILLIAM NEILSON LIMITED; RE UFCW; CLAC ..... (Sept./Oct.) 754

Certification Where Act Contravened – Construction Industry – Unfair Labour Practice – The certification and the ULP applications both indicated that the union might seek relief to be certified under section 11 of the Act – The employer made a motion on the first day of hearing to have the Board "strike" the reference to section 11 on both applications, arguing that once a trade union has made an application under section 128.1 it cannot "convert" the application to one brought pursuant to section 8 of the Act – The Board found it does have the power, pursuant to Rule 40.5, to permit an applicant to amend its application – The applicant must provide the Board with a reason to exercise its discretion – Whether the Board will permit a party to amend its application is a question of prejudice to other parties in the case and must be determined at the time the request is made – As the applicant was not seeking such an amendment at the time, the decision dealt only with whether an amendment to an application is available – Matter continues

L & L PAINTING AND DECORATING LTD.; RE THE INTERNATIONAL UNIONS OF PAINTERS AND ALLIED TRADES, LOCAL 557 ..... (May/June) 385

Certification – Representation Vote – The employer challenged the Returning Officer's determination that one ballot was spoiled in the representation vote held in this matter – The ballot, although it indicated the voter's preference in the appropriate way, was also marked by what appeared to be initials – The Board surveyed its jurisprudence on spoiled ballots and a majority held that on its face the impugned ballot potentially revealed the

identity of the voter and consequently cast doubt on the voter's preference – The Board held the ballot was a nullity and could not be counted – Certificate issued

INTERNATIONAL COLD STORAGE 2003 INC.; RE TEAMSTERS LOCAL UNION NO. 419..... (July/Aug.) 546

Certification – Reconsideration – Timeliness – Unfair Labour Practice – The union sought reconsideration of the decision dismissing the application for certification - Although the union indicated on the certification worksheet that it intended to file an unfair labour practice about the employer's conduct, the Board did not receive any representations in the five-day post-vote period provided for in its decision ordering the vote – The Union argued that it had difficulty obtaining timely statements from employees because of the employer's impugned conduct and it filed its s. 96 application as soon as it had gathered those statements (one week after the Board's decision dismissing the certification application) – The Board found that the union had sufficient knowledge of the allegations at the time of the vote or immediately thereafter to make appropriate representations – Request for reconsideration denied – Unfair labour practice complaint continues

THE CORPORATION OF THE COUNTY OF SIMCOE (GEORGIAN MANOR); RE SEIU LOCAL 1.on ..... (Sept./Oct.) 751

Certification – Timeliness – The Labourers applied to represent non-construction employees of Belanger – The Operating Engineers ("Local 793") asserted that their all-employee collective agreement encompassed the employees in question, so the application was untimely – The work related to highway maintenance contracts Belanger entered into with the City of Sudbury and the Ministry of Transportation – Belanger used a combination of Local 793 members and other individuals to perform the work, and Local 793 had never taken steps to enforce the collective agreement it claimed related to the highway maintenance work – The Board held that a collective agreement that requires an employer to pay its employees in a particular way when they are performing work outside the scope of the agreement does not extend the scope of the agreement to cover that work – Timeliness argument dismissed, matter continues

BELANGER CONSTRUCTION (1981) INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE IUOE, LOCAL 793; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486.....(Nov./Dec.) 776

Change in Working Conditions – Interference with Trade Unions – Unfair Labour Practice – Lock-Out – An application was filed by the union pursuant to section 96, alleging that the responding party had violated sections 70, 72, 73, 76, 83, and 86 of the Act – The collective agreement between the two parties expired on August 31, 2005, and they were in a strike/lock-out position on December 5, 2005 – The responding party did not lock-out its employees – Rather, commencing December 5, it began to pay them in accordance with the new terms and conditions of employment that the responding party had unilaterally implemented – The applicant argued that the employer could not impose terms and conditions of employment until after it had locked-out its employees, and that any implementation of terms and conditions of employment prior to a lock-out constituted direct bargaining with employees contrary to section 73 – The responding party relied on section 86, which in its view gave it the right to change the terms and conditions of employment on the date at which the lock-out period commenced, even if no lock-out actually occurred – The Board agreed with the responding party, holding that once the parties are in a strike or lock-out position, section 86 does not prevent an employer from altering the terms and conditions of employment without the union's

consent – Since the responding party altered the terms and conditions of employment only after the lock-out period had commenced, it did not violate section 86 – The Board also held there was no breach of section 73, finding that "altering" working conditions is not the same as "bargaining" directly with bargaining unit employees – The facts also did not disclose a breach of sections 70, 72, or 76 – As for section 83, since the parties were in a strike/lock-out position, there could be no violation – Application dismissed

NEENAH PAPER COMPANY OF CANADA; RE UNITED STEELWORKERS I-2693 ..... (Mar./Apr.) 224

Charter of Rights and Freedoms – Certification – Practice and Procedure – Representation Vote – Standing – In this application for certification, the employer sought a declaration that the representation vote was void, that a new vote should be ordered, and that the Board either translate the ballots into Chinese and Punjabi, and/or allow the presence and use of an interpreter to assist the voters at the vote – Issues addressed were: does the employer have standing to raise arguments relating to the Charter in this case; did the Board violate sections 2(d) and/or 14 and/or 15(1) of the Charter in refusing to allow translated ballots or the presence of interpreters at the vote; if the Board did violate sections 2(d) or 14 or 15 of the Charter is it justified under section 1 of the Charter; did the Board violate section 5 and 6 of the Ontario Human Rights Code in refusing to allow translated ballots and the presence of translators at the vote – The Board saw no reason to allow standing in a situation of a long established practice where no employee raises the issue despite numerous notices posted – The Board also considered the other issues and was not persuaded that the vote, as carried out, had breached either the Charter or the Code – The Board held that the certification process and representation vote procedures are not protected activities under s. 2(d) – The Board held s.14 to only be available to parties or witnesses, and since the individual employees, on whose behalf relief was sought, were neither parties to this application nor witnesses, the section did not apply – The Board adopted the reasoning from R-Theta Inc. and found no breach of s.15 – Certificate issued

MAPLE LEAF CONSUMER FOODS INC.; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ..... (July/Aug.) 558

Collective Agreement – Bargaining Rights – Sale of Business – The applicant unions sought a declaration that there has been a sale of business from the former Ontario Hydro to the Independent Electricity System Operator ("IESO") – CUSW sought a declaration that the IESO thereby became bound by the bargaining rights held by CUSW for employees of the former Ontario Hydro and that CUSW is entitled to give notice to bargain to the IESO – LIUNA similarly sought a declaration that the IESO became bound by various collective agreements binding LIUNA and the former Ontario Hydro as a consequence of the sale of business and are therefore entitled to give notice to bargain regarding those collective agreements – The IESO was established by the *Electricity Act (*E.A.*)* as a not-for-profit, non-share capital corporation through re-organizing the former Ontario Hydro – The applicant unions submitted that the IESO acquired the assets, liabilities, responsibilities and functions of the Central Market Operator ("CMO") business unit of the former Ontario Hydro and this unit was responsible for the electricity grid – The unions claim the IESO continued to perform that function, albeit in a different manner, following the enactment of the E.A. – The responding party submitted that the IESO is a brand new organization, which is independently involved in setting the market prices for electricity and also has responsibility to oversee the reliability of the electricity grid in Ontario – With respect to CUSW, the responding party contends that CUSW never had a

collective agreement with the former Ontario Hydro or with the IESO and that CUSW made no claim for bargaining rights in a timely fashion – With respect to LIUNA, the responding party contends that LIUNA never sought to engage in collective bargaining with the IESO and that it was not clear to the IESO that LIUNA was asserting bargaining rights until after the mediation meeting – The Board held that, from a review of the E.A. and the Transfer Order there was a transfer or disposition from the former Ontario Hydro to the IESO meeting the first requirement of a "sale of business" – At issue was whether what was transferred to the IESO under the terms of the legislation can be characterized as part of the "business" of the former Ontario Hydro within the meaning of section 69 of the *LRA* – When the Board considered what is meant by "business" or part of a business in section 69, the Board looked at the essential elements of the given undertaking and whether a coherent grouping of those elements had been transferred – The factors the Board considers include; the absence of a hiatus in operations following the transfer, the extent to which the transferee derives its ability to carry on business following that which was transferred, and whether the transferor subsequently ceased to carry on business – The evidence before the Board showed that virtually all the assets and liabilities of the CMO business unit were transferred to the IESO, and there was little that changed in the day-to-day functions of the employees who were transferred to the IESO at the time of the de-merger – The Board held that the fact that the IESO carries out what is substantially the same responsibility in respect of reliability in a somewhat different manner does not imply that there has been a change in the character of the business following the transfer – The Board has recognized that there are inevitable changes in the manner in which a new entity will carry on business, particularly where only a part of a business of the predecessor has been transferred – The Board rejected the suggestion that, no sale of the business declaration should issue since there was no transfer of the construction part of the business of the former Ontario Hydro to the IESO to which the applicant bargaining rights apply – The Board further recognized that a period of apparent inactivity by a trade union asserting its rights will not necessarily indicate that the union has abandoned its bargaining rights, particularly where that period of inactivity occurs in a period in which there are no employees working in the bargaining unit – The Board found that neither CUSW nor LIUNA abandoned their bargaining rights in respect of the IESO, as alleged – The Board held the bargaining rights of CUSW and LIUNA continue in this new entity and IESO is bound to the collective agreements

ONTARIO ELECTRICITY FINANCIAL CORPORATION AND INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS; LIUNA, LIUNA ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1059 ..... (July/Aug.) 594

Collective Agreement – Certification – Timeliness – Three applications for certification were set down for hearing to determine whether any collective agreements existed between any of the applicants and Comstock, the responding party, at the intervenor's construction project – Two of the applicants (Millwrights and Carpenters) conceded their applications were untimely – The Labourers argued there was no collective agreement bar to their application – Comstock claimed it was bound by the collective agreement between the Labourers and the intervenor, Brighton Beach Power, because Comstock had signed a document (the Brighton Beach agreement) acknowledging that it had received a copy of the collective agreement between Brighton and the Labourers – The Board held that the agreement between the Labourers and Brighton could not bind the Labourers to Comstock, without notice to the Labourers of an agreement to be bound or acceptance by the Labourers that Comstock was bound – Furthermore, just because Comstock was abiding by the terms and conditions of the collective agreement did not mean it was bound by it where Comstock was not a signatory to that agreement – There was no

collective agreement bar to the application for certification by the Labourers – Matter continues

COMSTOCK CANADA LTD. ; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO; RE BRIGHTON BEACH POWER LTD..... (July/Aug.) 501

Conciliation – Reference – The Minister asked whether he had the authority to appoint a conciliation officer, where the union gave the employer notice to bargain eight years after the collective agreement, containing no renewal clause, had expired – The employer did not assert that the union had abandoned its bargaining rights – The Board found that while s. 59(1) precludes notice from being given until the final 90 days of the collective agreement, it does not provide that notice may only be given in the final 90 days – Therefore the notice of intent to bargain was a valid s. 59(1) notice – The Board's advice to the Minister was that he had the authority to appoint a conciliation officer

EVANS LUMBER AND BUILDERS SUPPLY LIMITED; RE WAREHOUSEMEN, TRANSPORTATION AND GENERAL WORKERS UNION, LOCAL 715 .. (Mar./Apr.) 149

Conflict of Interest – Standing - Trusteeship – In the continuing battle between LIUNA and Local 183, the trustee asked the Board to declare that 183's Jurisdictional Committee had no standing to continue in this litigation, and that 183's lawyers were in a conflict of interest because of their access to and knowledge of confidential information relating to the trusteeship – Given that the Committee was extinguished when the trusteeship was imposed, and that the trustee purported to dissolve the Committee in any event, the Board declared that the Committee was no longer an entity capable of continuing to participate in these matters; the two remaining members of the Committee were added as individual parties to this litigation – On the conflict issue, the Board held that the law firm possessed no confidential knowledge outside of what it had learned from its clients to support the litigation – Since there has been no change in positions, and no individual lawyers moving from one side of the litigation to the other, the Board found no conflict and allowed the firm to continue to represent its clients

UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE LIUNA ET AL.....(Nov./Dec.) 848

Consent to Prosecute – Contempt – Unfair Labour Practice – The union sought a ruling from the Board that the employer had failed to comply with certain directions issued in the unfair labour practice decision, as well as the Board's consent to initiate a prosecution of the employer for such failure – The Board found that the employer refused to recognize the trade union as the bargaining agent of its employees and failed to acknowledge the legitimacy of the collective bargaining and arbitration process – The employer's continued refusal to provide information to the union to enable it to quantify its damages caused the Board to state a case for contempt and consent to the launching of the prosecution – The Board declined to award legal costs against the employer – Application granted

1229026 ONTARIO INC. C.O.B. AS PLACE MONT ROC ; RE UNITED STEELWORKERS, LOCAL 1-1000 ..... (May/June) 307

Constitutional Law – Interim Relief – Intervenor – Judicial Review – Reference – Unfair Labour Practice – The Board considered whether certain provisions of the *Labour Relations Act, 1995* are of no force and effect by reason of either the enactment of a First Nation *Labour Code*, aboriginal or treaty rights, or the First Nation's inherent right to

self-government – The Board addressed the concept of aboriginal rights and considered the test to be applied in determining whether a right has been established – Citing *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – Constitutional question answered in the negative – Employer is obliged to bargain and the Minister may appoint a conciliator – On judicial review, the Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the First Nation had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the court held that the Board had the statutory authority to conduct the proceedings as it did – Application for judicial review dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB ..... (May/June) 450

Construction Industry – Adjournment – Certification – Practice and Procedure – Related Employer – Sale of a Business – Unfair Labour Practice – The responding parties sought an adjournment of these proceedings because of a pending criminal trial involving the employer's representative and an employee – The responding parties argued that because of an Undertaking Given to a Peace Officer, the employer's representative was prohibited from "going to anyplace" the employee was to be (he was a potential witness in these proceedings) – Once the Board established that the employee was not in attendance, it ordered the employer's representative to appear at the hearing – The Board refused to adjourn its proceedings: first, there was no consent to the request; second, the Board gives priority to serious allegations of unfair labour practices; third, the personal concerns of the employer's representative do not attract the same level of concern as do the interests of the parties; fourth, the Board is not in a position to remedy conflicts of loyalties a person may have (between self-interest and the interests of the employer) – Matters referred to Registrar to set hearing dates

NORTHLAND PROPERTIES CORPORATION ; VANDALAY CONTRACTING INC.; RE LIUNA LOCAL 506 ..... (Mar./Apr.) 245

Construction Industry – Alteration of Jurisdiction – Damages – Interim Relief – Practice and Procedure – Trade Union – Unfair Labour Practice – The Local complained that the International, without just cause and contrary to sections 147 and 149, altered the jurisdiction of the Local and placed it under supervision – The Local also complained that the International represented it in a manner that was arbitrary, discriminatory, or in bad faith – The Board determined that the matter required an expeditious resolution and that this could only be achieved through a consultation – In 2002, as the International restructured into Regional Councils, the Local voluntarily affiliated with GORC (which did not permit Locals to employ persons directly) and remained bound by the International's constitution – In 2005 a dispute arose between the Local and International when three Local officers either resigned or were dismissed from employment with GORC – The Local resolved to withdraw from GORC and remain autonomous; the International responded with an audit, a hearing and the placement of the Local under

supervision – The Board first found that there was no alteration of jurisdiction by the International: the International in attempting to keep the Local in the GORC, was doing nothing other than giving effect to the jurisdiction voluntarily assumed by the Local – The Board next considered the four factors set out in s. 147(3) for determining whether the International had cause and found in favour of the International having had cause – Further the Board found the International had just cause to assume supervision of the Local – The Local had no legitimate justification for its secession from the International at the outset and the interests of the Local, as distinct from the interests of the individuals, were not impaired or put in jeopardy by the supervision or the process leading to the supervision – Applications dismissed, subject to the issue of whether damages were payable

GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL & ALLIED WORKERS; RE CJA, LOCAL UNION 93 .....(Jan./Feb.) 52

Construction Industry – Bargaining Rights – Termination – Voluntary Recognition – In this application by the Painters to terminate the Plasterers' bargaining rights under s. 66, Syntex was bound to the Painters' Provincial Collective Agreement (which covered, among others, drywall tapers), when it obtained a subcontract from a general contractor bound to a collective agreement with the Plasterers' requiring that plasterers' work only be subcontracted to companies in contractual relations with that union – After commencing work and employing drywall tapers, Syntex entered into a voluntary recognition agreement with the Plasterers – The Board held that when there are actual persons employed in the bargaining unit, the union must demonstrate that it was entitled to represent those actual employees – Although the Plasterers' could not show they were entitled to represent the employees in the bargaining unit on the applicable date, the Board noted it still had discretion under s. 66 to decide whether to terminate the bargaining rights – The Board, following *Penegal Trim*, found nothing to override the fundamental right of the employees of this particular employer to freely select their own union – The Board declared that the Plasterers' were not, at the time the voluntary recognition agreement was entered into, entitled to represent employees in the bargaining unit set out therein, and that the Plasterers' bargaining rights obtained by voluntary recognition with Syntex were terminated as of the date of the Board's oral decision – Application granted

R.P. SYNTEX WALLS SYSTEMS; RE IUPAT LOCAL 1891; RE OPERATIVE PLASTERERS' AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA LOCAL 124.....(Nov./Dec.) 823

Construction Industry – Bargaining Unit – Certification – Employee – The union sought to certify all construction labourers of the employer – The employees in dispute cleaned trailers at the worksite that contained lunchrooms, washrooms and offices – The employer argued its employees were engaged in "cleaning" and not "clean-up" and were performing the same work they would in a private residence or doctor's office – The Board refused to make the distinction urged upon it by the employer, finding that the cleaning of the construction trailers was a necessary support for the various trades on site – Certification granted

646849 ONTARIO LTD. C.O.B. AS MAGIC MAID CLEANING SERVICES ; RE LIUNA, LOCAL 1089..... (July/Aug.) 475

Construction Industry – Bargaining Unit – Certification – Employee – Status – The union applied to certify employees of the responding party in all sectors of the construction

industry other than ICI – At the outset of the hearing, the parties agreed that the first issue to be dealt with was whether employees performing general landscape maintenance were working in the bargaining unit on the date of application – The employer sought to rely on a standard industry collective agreement which purported to include the work the employees were performing in the definition of construction work – The Board found that routine grounds maintenance at a site where no construction work was being carried out could not constitute "construction industry" work for purposes of the certification application – The Board held it could not look at the expanded definition of construction work in a collective agreement nor at landscaping industry practice to modify the Act or alter the scope of the provision of the Act pertaining to the construction industry – The employees in question were not properly on the list – Matter continues

HANK DEENEN LANDSCAPING LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (July/Aug.) 513

Construction Industry – Bargaining Unit – Certification – LIUNA applied for ICI certification and two weeks later made a non-construction industry application for certification with respect to the same employees – The Board addressed two preliminary issues: whether the applicant was entitled to file "overlapping" applications and whether the applicant must show that at least two persons were at work on the day of application in the ICI sector –With regard to the first issue, while the Board confirmed that the same employees are not normally entitled to be members of two different bargaining units in applications brought on the same day, the Board held that LIUNA's two applications filed on different days did not amount to an abuse of process – The Board found the asserted overlap was a consequence of Swift's contention that many of the employees in the construction application did not perform construction work – With regard to the second issue, despite Swift's suggested alternate interpretation of s. 158(1), the Board found the section did not require at least two employees to be at work in both ICI and non-ICI sectors of the unit on the application date – The Board found this would contradict the statutory provision constituting both ICI and non-ICI workers as a single 'unit' for the purposes of the assessment of a certification application – Matter continues

SWIFT RAILROAD CONTRACTORS CORPORATION; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICAN ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Sept./Oct.) 741

Construction Industry – Bargaining Unit – Certification –Membership Evidence – Timeliness – After the two-day time limit under 128.1(3) had lapsed City Core filed a revised list that included three additional names – The union challenged the inclusion of two of these individuals, arguing City Core was statutorily prohibited from adding names after the two day time limit under 128.1(3) had lapsed – In regard to the third employee, the union did not challenge this employee's inclusion on the list as both sides had agreed he was to be included during a subsequent Regional Certification meeting – The Board found that City Core was prohibited from adding names to its list of employees after the expiry of the two day statutory period – The Board, however, permitted the inclusion of the third employee as neither party had challenged City Core's addition of this employee's name during the Regional Certification meeting and the Union would have been permitted to add the third employee to the list if City Core had not already done so – Matter continues

CITY CORE MECHANICAL LTD.; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 46 ..... (Sept./Oct.) 673

Construction Industry – Bargaining Unit – Certification – Sector Determination – Status – In this application for certification for a bargaining unit in all sectors in the construction industry other than the ICI, the status of five individuals was in dispute – Sector was a disputed issue and the Board considered for the first time whether the "majority of time" test from *Gilvesy* should apply to a consideration of sector – The Board noted that it took a "snapshot" of what occurred on the date of application to determine which bargaining unit an employee was employed in – The Board has used the majority of time test to determine which trade of work an individual was performing and also to determine into which geographic area an individual worked (see *Advance Tile and Carpet*) – The Board found there was no material or principled distinction between identifying the geographic scope in which the employee was working on the date of application and the sector – Accordingly it was appropriate to apply a majority of time test, where the unit applied for does not encompass all sectors, to assess whether the person falls within the applicable sector – The Board upheld the union challenges to four of the five individuals – Certificate issued

EASTWAY CONSTRUCTION LTD.; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS UNITED PENTERS AND JOINERS OF AMERICA ..... (May/June) 341

Construction Industry – Bargaining Unit – Certification – Status – In this application for certification, the Board considered the status of an employee on the date of application and whether, should there be a finding that he was a dependent contractor, he could be included in a bargaining unit of "traditional" employees in light of the provisions of subsections 9(5) and 152(2) of the Act – In concluding that the employee in question was a dependent contractor and should be included in the bargaining unit, the Board held that there is a spectrum of work relationships where more or fewer of the various criteria pointing to employee or independent contractor status may be found – The Board found, however, that there was no need to distinguish between "traditional" employees and dependent contractors in a subsection 158(2) certification application, as the subsection mandates that both types of employees shall be included in one unit of employees, and that such unit shall be deemed appropriate for collective bargaining – Moreover, subsection 9(5) does not apply to subsection 158(2) due to the operation of section 126.1 of the Act – Accordingly, dependent contractors must be included in a single bargaining unit with other employees in a construction industry certification brought under subsection 158(2) of the Act – Application granted

GREENVILLA DEVELOPMENT GROUP INC. ; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .....(Jan./Feb.) 63

Construction Industry – Bargaining Unit – Certification – Status – On the application date the challenged individual, a salaried employee who worked as an estimator and sometimes on the tools, spent part of the day doing wiring work (bargaining unit work) and the remainder of the day determining whether an electric control system installed in part of the building could be extended – The Board first found that the work of determining whether the system could be extended was similar to preparing estimates and was not work in the construction industry – The Board next found that the evidence did not establish that the individual was engaged in bargaining unit work for the majority of the application day – Accordingly, the Board examined other relevant factors (reason for hire was as an estimator; the employee never spent the entire day on the tools; he no longer held a valid Certificate of Qualification; as a salaried employee, he was generally not required to record his hours) and concluded that he was not an employee in the bargaining unit on the application date – Certificate issued

EVERBRITE INDUSTRIES LTD.; IBEW, LOCAL 353 .....(Jan./Feb.) 36

Construction Industry – Bargaining Rights – Evidence – Practice and Procedure – Termination – When the IBEW objected to the evidence of employee wishes supplied by the applicant and the Board determined that only photocopies had been filed with the application, the applicant was able to produce the original document to overcome the objection since there were no other defects in the application materials – The Board held that one copy of the employees' wishes was adequate for multiple applications: it is not necessary for employees signing an expression of their wishes to stipulate the Board Area or sector of the construction industry in which they are working in order to make clear that they do not want to be represented any longer by their bargaining agent – The wording of the document providing evidence of the employees' wishes must be sufficient to show the intention – Matter continues

JLY ELECTRIC LTD.; RE ERNIE PICKARD; IBEW, LOCAL 105; IBEW CONSTRUCTION COUNCIL OF ONTARIO.....(Sept./Oct.) 710

Construction Industry – Certification – Employee – Membership Evidence – Practice and Procedure – Reconsideration – The employer requested reconsideration of the Board's decision to certify the union under s. 128.1 based on membership evidence filed by the union on behalf of more than 55% of the employees in the bargaining unit – The employer filed affidavit evidence, in which each affiant stated they had not signed a union membership card, from three of its five employees who were on the list of employees the Board considered when it made its certification determination – The allegations were specific, detailed and quite serious as they raised an issue of fraud or misrepresentation – The Board noted that at least one of the three affiants appeared to have signed a union membership card, however the Board did not disclose the degree of overlap between the membership evidence and the three affiants nor did it disclose the identity of the person or persons who appeared to have signed a card – The Board set the request for reconsideration down for hearing – Matter continues

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL..... 804

Construction Industry – Certification – Employee – Membership Evidence – Status – The responding party filed a timely response in this application for certification – The employer's primary position was that it had no employees in the bargaining unit because it was not the employer of the persons the applicant had sought to represent; it filed no names on its "Schedule A" – In the alternative, the responding party asserted there were seven more individuals than the four identified in the applicant's materials doing the same work on the application date; at the hearing the responding party sought to add the seven individuals to its "Schedule A" – The Board held that a responding party seeking to assert it is an employer of more individuals than the applicant has proposed must, pursuant to s. 128.1(3), provide the names of those individuals in a timely way, even if its submission relating to those individuals is an alternative position – Employer's motion to file the list of names after the two-day period set out in 128.1(3) dismissed – Matter continues

DESI'S ALUMINIUM CAMBRIDGE; RE CARPENTERS' UNION, CENTRAL ONTARIO REGIONAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA. .....(Sept./Oct.) 700

Construction Industry – Certification – In this application for certification in the construction industry the responding parties did not file information specified under subsection 128.1(3) of the Act or a response within the required time limits – A letter was filed with the Board by Easton's after the two-day time limit stating that neither it nor the other responding party is the employer of the individuals described in the applicant's bargaining unit – The applicant argued that the Board was precluded from considering the information offered by Easton's because subsections 128.1(3) and (4) required such information to be filed within the prescribed time limits, whereas the responding parties argued that the subsection does not apply to them in these circumstances because neither of them is an "employer" – The Board held that both statutory and labour relations policy support the conclusion that subsection 128.1(3) of the Act should not foreclose the Board's consideration of the information it deems appropriate in order to determine if a named responding party is the employer of those individuals working in the proposed bargaining unit – The Board further stated that the scope of the information required under subsection 128.1(3) of the Act does not include whether the entity named as a responding party is the employer – Accordingly considerations of this matter, where it is delivered beyond the time limits specified in Board Rule 25.5, depends on the exercise of the Board's discretion under Rule 40.7 – The Board held, given that Easton's letter was just a few days late and that the applicant did not allege it suffered any prejudice due to this delay, that it was prepared to extend the time limit for filing the responding parties' letter – Scheduled for hearing

EASTON'S GROUP OF HOTELS INC. AND 1406284 ONTARIO INC.; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA..... (July/Aug.) 508

Construction Industry – Certification – Membership Evidence – Practice and Procedure – The Board decided after examining the membership evidence that the dates on which the cards were signed should be disclosed for the following reasons: the information was arguably relevant; the pattern of dates on the cards was not likely to distort any party's presentation of its case; and, given that the Board might draw some conclusions from having looked at the dates, natural justice required that the parties be entitled to the information in order to make submissions – Finally, the Board refused to disclose the total number of cards in the application, since such disclosure would open the door to changes of position based on the perception of the likely strength of the union rather than a desire to identify which employees are actually in the appropriate bargaining unit

PRE ENG CONTRACTING; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA(May/June) 407

Construction Industry – Certification – Practice and Procedure – Reconsideration – Broccolini Construction asked the Board to reconsider its decision to certify a unit of carpenters and carpenter's apprentices – Broccolini did not file a response to the application for certification when it first received the application, mistakenly believing the certification application only applied to a subcontractor under its employ – Broccolini did not forward the certification application materials to the subcontractor – Following the issuing of the certificate, Broccolini filed a reconsideration application and sought to litigate the issue before the Board, alleging it was not the employer of the employees on the certificate – The Board found there was a heavier burden of persuasion on a party seeking reconsideration where a certificate has been issued and questioned why Broccolini had made no effort whatsoever to respond to the initial certification application – Consequently, the Board declined to reconsider its decision to certify the union

BROCCOLINI CONSTRUCTION (ONTARIO) INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 ..... (Sept./Oct.) 667

Construction Industry – Certification – Practice and Procedure – Reconsideration – Having failed to file a response or the information required under s. 128.1(3) within the time stipulated, the employer asked the Board to reconsider its decision certifying the applicant on the basis that the applicant did not deliver a copy of the application to the employer – Although a successful facsimile transmission report was entered by the union, the employer argued that the 58 page transmission never came to the attention of the employer – The Board found that in the absence of any record from the employer's facsimile machine to suggest that no transmission was received, the evidence established that the application was received – The risk falls on the employer to keep adequate track of facsimiles received – Therefore the Board found the delivery effective – Request for reconsideration dismissed

GLASBAU HAHN GMBH + CO. KG ; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, CJA ..... (Mar./Apr.) 154

Construction Industry – Certification – Practice and Procedure – Reconsideration – PRW requested reconsideration of the Board's decision certifying the applicant on the basis of only the information provided by the applicant, as PRW had failed to file its response in a timely manner as required by s. 128.1(3) – Since PRW's allegations, if true, meant there would be only one employee in the bargaining unit, it argued that the applicant's information "misrepresented" the bargaining unit and the Board should exercise its discretion to consider the information under s. 128.1(5) – The Board found that misrepresentation must include some additional element or aspect that could not have been addressed by the provision of information in the normal course by the employer under s. 128.1(3), otherwise common construction industry status disputes could be characterized as misrepresentations – Additionally the Board noted that PRW had not alleged any wrongdoing by the applicant through the statements filed – Request for reconsideration dismissed

PRW EXCAVATING CONTRACTORS LTD. ; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Mar./Apr.) 274

Construction Industry – Certification – Practice and Procedure – Reconsideration – Status – During the hearing of status disputes in this application for certification, the applicant sought to admit a cleaning contract that would indicate one of the witnesses was cleaning a certain residence at the time of certification – The witness had already concluded her testimony and had claimed she did not clean the residence in question – The respondent objected to the admissibility of the contract on the basis of the rule in *Browne v. Dunn* and the Board sustained the objection – At the next hearing date, the applicant sought reconsideration of the procedural ruling – The Board considered the rule's proper application in the certification context: at no time had the applicant introduced the evidence during cross-examination of the witness; the document was not relevant to any issue other than impeaching the witness' testimony; the contract went to the essential issue of whether the witness was performing bargaining unit work on the date of application – Finding the rule applied, the Board held that serious prejudice would be caused by allowing the contract to be entered into evidence: the applicant would be allowed to split its case and the already two-year-old application would be further lengthened, thereby compromising the efficiency of the Board's certification process – In

contrast, the prejudice suffered by the applicant was minimal – Although not determinative of the matter, the Board also noted that the applicant had failed to follow Rule 8.3 of the Board's Rules of Procedure – Having regard to the purpose of the Act and labour relations principles, the Board confirmed its original ruling that the evidence was inadmissible – Reconsideration denied; matter continues

JOHN BODDY DEVELOPMENTS LTD.; RE LIUNA LOCAL 183 ..... (May/June) 360

Construction Industry – Certification – Practice and Procedure – Reconsideration – The Board was asked to reconsider its certification of the applicant by employees who did not receive notice of the certification application from either the employer or the union – Even on the employees' best case the Board would still have certified the applicant – Therefore, the failure to provide the notice to employees would not have affected the Board's decision – Reconsideration request dismissed

CARLETON IRON WORKS CO. LIMITED; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 765 ..... (Jan./Feb.) 15

Construction Industry – Certification – Practice and Procedure – The applicant filed its application for certification by Priority Courier on a Saturday, including a signed but incomplete Declaration Verifying Membership Evidence (Form A-74) – The applicant corrected its error by filing a completed Form on Monday – The Board found that both the application and the Form arrived at the Board on the same day, although they were filed on different days – There was no prejudice to the responding party, so the Board exercised its discretion to relieve against the technical violation of Rule 25.1 (duty to file all documents with the application) – Certification granted

BALKO DRYWALL INC ; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 ..... (Mar./Apr.) 130

Construction Industry – Certification – Practice and Procedure – Unfair Labour Practice – In response to the union's application for certification, accompanied by a request for relief under section 11, the employer provided a materially significant 8.1 notice – The union asked that no representation vote be held (notwithstanding a finding of not less than forty percent of the individuals in the bargaining unit proposed in the application) until its s. 11 relief was determined, however the Board found that s. 8(2) requires that a representation vote be taken – Finally, although the employer consented to the counting of the ballots, given that the union had sought a delay in the representation vote, the Board was uncertain whether the union consented to the ballots being counted and ordered the ballot box sealed until the Board so orders or the parties agree – Matter continues

EAST ELGIN CONCRETE FORMING LIMITED ; RE LIUNA LOCAL 1059. ..... (Sept./Oct.) 706

Construction Industry – Certification Where Act Contravened – Unfair Labour Practice – The certification and the ULP applications both indicated that the union might seek relief to be certified under section 11 of the Act – The employer made a motion on the first day of hearing to have the Board "strike" the reference to section 11 on both applications, arguing that once a trade union has made an application under section 128.1 it cannot "convert" the application to one brought pursuant to section 8 of the Act – The Board found it does have the power, pursuant to Rule 40.5, to permit an applicant to amend its application – The applicant must provide the Board with a reason to exercise its

discretion – Whether the Board will permit a party to amend its application is a question of prejudice to other parties in the case and must be determined at the time the request is made – As the applicant was not seeking such an amendment at the time, the decision dealt only with whether an amendment to an application is available – Matter continues

L & L PAINTING AND DECORATING LTD.; RE THE INTERNATIONAL UNIONS OF PAINTERS AND ALLIED TRADES, LOCAL 557 ..... (May/June) 385

Construction Industry – Construction Industry Grievance – Damages – Practice and Procedure – Reconsideration – The Board was asked to reconsider a default judgment and applied the four factors set out in *Weinmann Electric Ltd.* – The explanation for the default weighed against granting the request since the responding party's failure to respond was due to its own lack of diligence – The other three factors weighed in favour of the responding party: its reconsideration request was filed in a timely fashion; members of another trade union were performing the work in question thereby providing *prima facie* evidence that there existed a good defence on the merits; and the applicant could not claim prejudice given that it did not come to the Board with clean hands in that it failed to notify the other union of the application – Accordingly the Board granted the application and set aside the default judgment – Grievance continues

BLACK & MCDONALD LIMITED; RE IBEW, LOCAL 120 .....(Jan./Feb.) 1

Construction Industry – Construction Industry Grievance – Discharge – In this discharge grievance, the grievor had 15 years' seniority, although his service with the responding party was less than three years at the time of his termination – The grievor was involved in three disciplinary incidents: the first was a physical altercation with another employee; the latter two incidents involved creating a disturbance in a client's security office and damaging equipment (entry key, pager) – The client barred the grievor from its premises and he was discharged – With respect to the two culminating incidents, the Board found that they were more than minor in nature – However, the Board found that the grievor had not generated any problems during his first two years of employment with the responding party and that he expressed genuine remorse over the final incident – While it is significant when a client bars a grievor from its premises, the Board held that such an action is not determinative of the matter – The Board found that progressive discipline was appropriate in this case – Accordingly, the Board reinstated the grievor, but treated the period of time from the discharge to the date of the Board decision as a period of suspension without pay – Application granted

OTIS CANADA INC.; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 96 ..... (Mar./Apr.) 268

Construction Industry – Construction Industry Grievance – Related Employer – Sale of Business – In this application under sections 1(4) and 69 and referral of a grievance, the material facts were not in dispute – A father owned and operated the alleged predecessor company, PJH&P, which was bound to both an ICI collective agreement and a residential agreement with the applicant – An agreement of purchase and sale entered into with his son provided for the transfer of a list of assets including trucks, plumbing, pipefitting, and sheet metal material, furnaces and machinery – The son incorporated his business which became JJP&H – PJH&P was no longer operational, and the father had no involvement in his son's company – The Board held that there was no common control or direction between the entities as required under section 1(4) of the Act – With respect to the sale of business provisions, the Board determined that at the time of transfer, what enabled JJP&H to enter the market and operate effectively was the business of PJH&P – There

was not only the use of equipment and the use of employees, but the transfer of every element of the business other than the owner – Accordingly, the Board held that a functional coherent business unit was transferred to JJP&H in its entirety – In finding a transfer of business occurred, the Board held that the applicant union's established rights should be preserved – Application granted

JANZEN PLUMBING & HEATING LTD.; PETER JANZEN HEATING & PLUMBING INC; JAMIE JANZEN PLUMBING & HEATING; RE ONTARIO PIPE TRADES COUNCIL AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 666 .....(Jan./Feb.) 72

Construction Industry – Duty to Bargain in Good Faith – Standing – Unfair Labour Practice – To secure itself a subcontractor to install cedar shingles, SLR signed a collective agreement with the Carpenters, after having been told by the subcontractor that the Residential Roofing Agreement was standard across the province and included a letter of understanding specifying wage rates for cedar shingling – After the subcontractor abandoned its contract with SLR, and SLR was forced to pay another entity higher rates to complete the work, SLR complained that both the subcontractor and the Carpenters had violated sections 17 and 70 of the Act, because the agreement SLR was given to sign was not in fact standard across the province – The Board held that an employer has no standing to bring a complaint under s. 70, so that element of the application was dismissed – With respect to the duty to bargain in good faith, the Board found that the Carpenters did not hold bargaining rights for the employees at the time that bargaining with SLR took place, so no such duty arose in the circumstances – Application dismissed

S.L.R. ROOFING AND SHEET METAL; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE ROBERT SHEWELL; RE 6221220 CANADA INC. O/A JIM'S ROOFING AND JIM LEBLANC .....(Nov./Dec.) 832

Construction Industry – Judicial Review – Public Sector Labour Relations Transition Act – Related Employer – Sale of Business – Stay –The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – Subsequent to its related employer decision the Board scheduled a grievance, alleging a failure to comply with the provincial agreement, involving some of the parties, which had been adjourned pending the related employer application – The School Board brought an application for a stay to Divisional Court pending the hearing of its judicial review application on the finding of relatedness – The Court dismissed the motion noting that the parties had secured an early date for the judicial review application, and while commenting that there "may be some benefit gained by the parties" if the grievance was adjourned pending the outcome of the judicial review application, the Court left that issue to be determined by the Board, given the slow pace with which the litigation had been advanced – Motion for stay dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOAL 773 et al ..... (May/June) 473

Construction Industry – Jurisdictional Dispute – Sector Determination – Two sector determination applications were heard together to determine whether two construction projects came within the ICI or the electrical power systems sector (EPS) The Board

considered the meaning and scope of the EPS sector classification – The two construction projects were private sector initiatives aimed at assembling, erecting and installing sixty-six wind turbine electric generators with various affiliated transmission lines, transformers and substations – In examining whether or not the scope of the EPS sector should be restricted to projects taking place on what was once Ontario Hydro property, the Board reviewed the historical reasons for the creation of different construction industry sectors under the *LRA* – While the Board acknowledged that the 1978 Ellis Report indicated the primary focus of the EPS sector was traditionally on public sector power generation projects, the Board found the scope of the EPS sector was broad enough to include privately owned and developed construction projects and went beyond construction work done on what was once the property of Ontario Hydro – After determining that the scope of the EPS sector may include privately owned and operated construction projects, the Board considered which sector was more appropriate for the projects – Both the 'end use' of a construction industry project and the collective bargaining patterns of contractors were found to be relevant – As private power generation initiatives were a relatively new phenomenon, the Board recognized bargaining patterns for these kinds of projects had not yet had sufficient time to develop and emerge – As a result greater reliance was placed on the two projects' end use – While the applicant argued the projects' end use had a commercial aspect suggesting an ICI sector classification, the Board found the projects' end use to be predominantly aimed at the generation and transmission of power – Consequently, the two projects were deemedto fall within the EPS sector

LEO ALARIE AND SONS LIMITED; BLACK AND MCDONALD LIMITED; RE LIUNA AND LIUNA ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, LOCAL 446; RE IUOE LOCAL 793; RE CANADIAN UNION OF SKILLED WORKERS; RE UNIVERSAL WORKERS' UNION, LOCAL 183; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 736; RE IBEW; RE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND ITS LOCAL 1592; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION ..... (Sept./Oct.) 721

Construction Industry – Parties – Related Employer – Sale of Business – Settlement – The IBEW Construction Council filed a related employer/sale of business application against the responding parties – The responding parties brought a preliminary motion to dismiss the application, relying on a settlement signed in 1999 by IBEW Local 586 and the responding parties – The parties to the Minutes of Settlement were Local 586 and the employers, but one clause purported to bind the Council and any of its affiliates and bar them from filing related employer/sale of business applications for a ten-year period – Although the individual who signed the agreement on behalf of Local 586 was also President of the Council, there was no evidence that he had actual or ostensible authority to bind the Council – The Board held that the Council cannot be bound to the 1999 agreement – Preliminary motion dismissed – Matter continues

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD. ; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO ..... (Mar./Apr.) 173

Construction Industry – Related Employer – Aecon Industrial and Aecon Buildings agreed that

they carry on associated or related activities under common control and direction; however, they asserted that the Board ought not to exercise its discretion to declare the companies related – The Board found that AI and AB had long-rooted presence in different markets in the construction industry and that the evidence of eight years of projects showed: AI had not wavered from its historical focus as a constructor of heavy industry manufacturing operations; AI had not diverted work to AB; and most significantly, there was no evidence of movement of heavy industrial plant work from AI to AB – Since the applicant's bargaining rights had not been harmed by the continued existence and prosperity of AB, the Board declined to make a single employer declaration – Application dismissed

AECON BUILDINGS AND AECON INDUSTRIAL; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 30 ..... (Mar./Apr.) 125

Construction Industry – Related Employer – Remedies – Sale of Business – In this 69/1(4) application, a construction project was bid, obtained and undertaken by three separate non-unionized corporations: WSM (general contractor), Humphrey (a mechanical contractor) and South Side (a plumbing sub-contractor) – The applicant union was successful at certifying South Side, after which Morgan, the owner, President and sole Director of South Side and WSM, moved the plumbing work at South Side to Humphrey and WSM to avoid the application of the applicant's Provincial ICI collective agreement – The Board found there was no disposition of a business within the purview of s. 69, but did find that the three corporations were one employer for the purposes of s. 1(4) – The Board found on these rare and specific facts that a full related employer declaration in respect of Humphrey would operate to extend rather than preserve the applicant's bargaining rights – Since this result would be neither fair nor appropriate the Board exercised its "or otherwise" discretion under s. 1(4) and fashioned a remedy only binding Humphrey to the applicant's collective agreement when it engaged in construction industry work with South Side and WSM – Sale of business application dismissed; Related employer application granted

HUMPHREY PLUMBING & ELECTRICAL SERVICE LTD., SOUTH SIDE LTD. AND W.S. MORGAN CONSTRUCTION LIMITED; RE UA, LOCAL 599.. (July/Aug.) 519

Construction Industry Grievance – Construction Industry – Damages – Practice and Procedure – Reconsideration – The Board was asked to reconsider a default judgment and applied the four factors set out in *Weinmann Electric Ltd.* – The explanation for the default weighed against granting the request since the responding party's failure to respond was due to its own lack of diligence – The other three factors weighed in favour of the responding party: its reconsideration request was filed in a timely fashion; members of another trade union were performing the work in question thereby providing *prima facie* evidence that there existed a good defence on the merits; and the applicant could not claim prejudice given that it did not come to the Board with clean hands in that it failed to notify the other union of the application – Accordingly the Board granted the application and set aside the default judgment – Grievance continues

BLACK & MCDONALD LIMITED; RE IBEW, LOCAL 120 .....(Jan./Feb.) 1

Construction Industry Grievance – Construction Industry – Discharge – In this discharge grievance, the grievor had 15 years' seniority, although his service with the responding party was less than three years at the time of his termination – The grievor was involved in three disciplinary incidents: the first was a physical altercation with another employee; the latter two incidents involved creating a disturbance in a client's security office and

damaging equipment (entry key, pager) – The client barred the grievor from its premises and he was discharged – With respect to the two culminating incidents, the Board found that they were more than minor in nature – However, the Board found that the grievor had not generated any problems during his first two years of employment with the responding party and that he expressed genuine remorse over the final incident – While it is significant when a client bars a grievor from its premises, the Board held that such an action is not determinative of the matter – The Board found that progressive discipline was appropriate in this case – Accordingly, the Board reinstated the grievor, but treated the period of time from the discharge to the date of the Board decision as a period of suspension without pay – Application granted

OTIS CANADA INC., RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 96.....(Mar./Apr.) 268

Construction Industry Grievance – Construction Industry – Related Employer – Sale of Business – In this application under sections 1(4) and 69 and referral of a grievance, the material facts were not in dispute – A father owned and operated the alleged predecessor company, PJH&P, which was bound to both an ICI collective agreement and a residential agreement with the applicant – An agreement of purchase and sale entered into with his son provided for the transfer of a list of assets including trucks, plumbing, pipefitting, and sheet metal material, furnaces and machinery – The son incorporated his business which became JJP&H – PJH&P was no longer operational, and the father had no involvement in his son's company – The Board held that there was no common control or direction between the entities as required under section 1(4) of the Act – With respect to the sale of business provisions, the Board determined that at the time of transfer, what enabled JJP&H to enter the market and operate effectively was the business of PJH&P – There was not only the use of equipment and the use of employees, but the transfer of every element of the business other than the owner – Accordingly, the Board held that a functional coherent business unit was transferred to JJP&H in its entirety – In finding a transfer of business occurred, the Board held that the applicant union's established rights should be preserved – Application granted

JANZEN PLUMBING & HEATING LTD.; PETER JANZEN HEATING & PLUMBING INC; JAMIE JANZEN PLUMBING & HEATING; RE ONTARIO PIPE TRADES COUNCIL AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 666 .....(Jan./Feb.) 72

Construction Industry Grievance – Contempt – Stated Case – The Board stated a case for contempt to Divisional Court when the responding party failed to attend a hearing or comply with production orders issued by the Board – When the responding party failed to appear at court, the Court found it to be in contempt of the Board and awarded a fine – The Court then made its own production order and adjourned the matter for one month to afford the responding party an opportunity to comply

D.M.S. CONCRETE & GENERAL CONTRACTING INC.; RE OPERATIVE PLASTERERS' CEMENT MASONS' AND RESTORATION STEEPLEJACKS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, UNION LOCAL 598 AND ONTARIO LABOUR RELATIONS BOARD.....(Nov./Dec.) 854

Construction Industry Grievance – Contempt – Stated Case – The Court found problems with the material before it respecting service on the respondents – The matter was adjourned to enable the applicant to either serve the respondents in accordance with the existing order

or to obtain in Divisional Court motions court an order permitting service on some other basis – Matter adjourned

D.M.S. CONCRETE & GENERAL CONTRACTING INC.; RE OPERATIVE PLASTERERS' CEMENT MASONS' AND RESTORATION STEEPLEJACKS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, UNION LOCAL 598 AND ONTARIO LABOUR RELATIONS BOARD.....(Nov./Dec.) 855

Construction Industry Grievance – Discharge – Practice and Procedure – The applicant grieved the discharge of two employees who were fired for allegedly smoking marijuana during their lunch break – The respondent sought to admit videotape surveillance it alleged depicted the grievors smoking marijuana in their truck located offsite of the employer's property – The applicant opposed the admission of the videotape on the basis that it violated the grievors' right to privacy and because the videotape was not produced in a timely manner – The Board considered two lines of arbitral authority on the admission of videotape surveillance: admission where the surveillance is relevant and admission where the surveillance is not conducted unreasonably or for an unreasonable purpose – The Board adopted the reasonableness test and found the surveillance was unreasonable for lack of sufficient motivation – A "feeling" that something is not right is no substitute for clear and reasonable grounds when employees are off duty and away from the worksite – The respondent had a less intrusive alternative to surveillance because it had an opportunity to observe the grievors' work performance but failed to observe such performance – Finally, there was a reasonable expectation of privacy because the grievors were in their own vehicle – On the issue of delay of production, the Board held it was open to counsel to obtain a production order – Matter continues

THYSSENKRUPP ELEVATOR (CANADA) LIMITED; RE IUEC, LOCAL 50 (May/June) 431

Construction Industry Grievance – Health and Safety – The union grieved the employer's refusal to provide personal and medical information to it following two workplace accidents involving union members – The employer argued the information was protected by the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA") because it was collected in the course of commercial activity and the employer required the individuals' consent to disclose – Additionally, the employer refused to release a copy of the workplace injury report (Form 7), asserting that the union has no obligation to represent workers in their compensation claims, and if the union wanted the information, it could seek the worker's consent – The Board held that a company's collection or disclosure of personal information of its employees for employment-related purposes does not constitute "commercial activity" contemplated in PIPEDA – The Board also held that s. 52(1) of the OHSA pre-dated the passage of PIPEDA, so the latter could not override the provincial legislation – In any event, the duty to disclose was required by law – Grievance granted

E.S. FOX LTD.; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS AND ITS LOCAL 736 .....(Jan./Feb.) 30

Construction Industry Grievance – Human Rights Code – The applicant grieved the employer's refusal to accept a referral to work of an employee over the age of 65 – The employer argued that it had established a policy not to "hire or employ" individuals over the age of 65 in November 2004 – The applicant argued that the employer did not consistently apply its policy (the employer had not required any employee who turned 65 to leave the workplace), therefore its application of the policy to the grievor was arbitrary,

discriminatory or unreasonable – The Board considered the recent amendments to the Ontario *Human Rights Code* (eliminating mandatory retirement), passed in December 2005 but only coming into effect in December 2006 – Even in the absence of the recent legislative amendments, the Board would have found the employer's actions discriminatory since the policy was not uniformly applied – Grievance allowed

E.S. FOX LTD.; RE UA ..... (May/June) 353

Construction Industry Grievance – In this referral by Local 1059 of a compilation of a number of grievances, the Board dealt with three issues raised as preliminary objections by Aecon: whether the Local is party to the collective agreement; whether sections 48 and 133 override any restrictions on grieving that may be contained in the collective agreement; whether article 2.03 of the collective agreement requires these types of grievances to be filed by the OPDC only – On the first issue the Board agreed with *Double S Construction* and found that both the Local and OPDC are parties in their own right to the collective agreement – On the second issue the Board found that article 2.03 does not purport to make a grievance inarbitrable, but rather purports to identify whether the Local or OPDC has carriage of a particular type of dispute – The Board found that this type of restriction was no different from those cases that required certain types of grievances to be filed by employees rather than by the union, and found that the article did not offend either s. 48 or 133 – On the final issue the Board found that while the Local had a right to file the grievances, once Aecon's defence raised issues of the interpretation, application or jurisdiction of the collective agreement, then OPDC must be made a party to the referral – Direction to make OPDC a party to the proceeding – Matter continues

AECON CONSTRUCTION & MATERIALS LIMITED; RE LIUNA LOCAL 1059 ..... (Sept./Oct.) 657

Construction Industry Grievance – Practice and Procedure – Two days after filing a grievance, the applicant advised the Board that the parties had agreed to adjourn the scheduled hearing to a date some six weeks later – The applicant specifically stated it was not consenting to "otherwise extend any time limits provided in the Board's Rules" – Although the responding party failed to file a timely Request for Hearing and Notice of Intent to Defend (Form A-87), the contact between the parties suggested to the Board that the responding party had expressed interest in the matter – The Board declined to proceed to determine the matter (issue a default judgement) without giving the responding party a further opportunity to file a Form A-87 together with the requisite fee – Matter deferred

LASALLE BACKHOE SERVICES; RE LIUNA LOCAL 625 ..... (Mar./Apr.) 186

Construction Industry Grievance – Remedies – The employer filed a grievance asking the Board to order the union to return a $50,000 bank draft, which was delivered to the union three years earlier to secure payment of contributions that might have been found owing either as a result of an audit that was to be conducted, or for future violations – There was no evidence of an audit having been done or violations of the collective agreement – The Board found no reason not to order the bank draft or equivalent money returned to the company – The Board made the order effective three weeks hence to give the union time to file a grievance and refer it to arbitration to establish any liability it may be able to establish – Grievance allowed

1210166 ONTARIO LTD. (C.O.B. D.C.C. CARPENTRY); RE CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA ..... (Mar./Apr.) 121

Contempt – Consent to Prosecute –Unfair Labour Practice – The union sought a ruling from the Board that the employer had failed to comply with certain directions issued in the unfair labour practice decision, as well as the Board's consent to initiate a prosecution of the employer for such failure – The Board found that the employer refused to recognize the trade union as the bargaining agent of its employees and failed to acknowledge the legitimacy of the collective bargaining and arbitration process – The employer's continued refusal to provide information to the union to enable it to quantify its damages caused the Board to state a case for contempt and consent to the launching of the prosecution – The Board declined to award legal costs against the employer – Application granted

1229026 ONTARIO INC. C.O.B. AS PLACE MONT ROC; RE UNITED STEELWORKERS, LOCAL 1-1000 ..... (May/June) 307

Construction Industry Grievance – The Carpenters grieved the denial of access to the construction site of a massive new intake channel being built under the city of Niagara Falls on property owned by Ontario Power Generation – Although it had no members working at the site, the union argued that it needed access to gather evidence for the jurisdictional dispute it had filed – Strabag resisted access, citing health and safety reasons, confidentiality and security – The Board held that since access had been duly negotiated and formed part of the collective agreement between the Carpenters and EPSCA, the employer's categorical denial of access could not be substantiated – The employer was allowed to impose restrictions to access that paralleled those of union representatives with members on site – Grievances against OPG and EPSCA dismissed; grievance against Strabag allowed

STRABAG INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18; RE ONTARIO POWER GENERATION INC. AND ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION .....(Nov./Dec.) 841

Contempt – Construction Industry Grievance - Stated Case - The Board stated a case for contempt to Divisional Court when the responding party failed to attend a hearing or comply with production orders issued by the Board – When the responding party failed to appear at court, the Court found it to be in contempt of the Board and awarded a fine – The Court then made its own production order and adjourned the matter for one month to afford the responding party an opportunity to comply

D.M.S. CONCRETE & GENERAL CONTRACTING INC.; RE OPERATIVE PLASTERERS' CEMENT MASONS' AND RESTORATION STEEPLEJACKS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, UNION LOCAL 598 AND ONTARIO LABOUR RELATIONS BOARD.....(Nov./Dec.) 854

Contempt – Construction Industry Grievance – Stated Case – The Court found problems with the material before it respecting service on the respondents – The matter was adjourned to enable the applicant to either serve the respondents in accordance with the existing order or to obtain in Divisional Court motions court an order permitting service on some other basis – Matter adjourned

D.M.S. CONCRETE & GENERAL CONTRACTING INC.; RE OPERATIVE PLASTERERS' CEMENT MASONS' AND RESTORATION STEEPLEJACKS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, UNION LOCAL 598 AND ONTARIO LABOUR RELATIONS BOARD.....(Nov./Dec.) 855

Damages – Alteration of Jurisdiction – Construction Industry – Interim Relief – Practice and Procedure – Trade Union – Unfair Labour Practice – The Local complained that the International, without just cause and contrary to sections 147 and 149, altered the jurisdiction of the Local and placed it under supervision – The Local also complained that the International represented it in a manner that was arbitrary, discriminatory, or in bad faith – The Board determined that the matter required an expeditious resolution and that this could only be achieved through a consultation – In 2002, as the International restructured into Regional Councils, the Local voluntarily affiliated with GORC (which did not permit Locals to employ persons directly) and remained bound by the International's constitution – In 2005 a dispute arose between the Local and International when three Local officers either resigned or were dismissed from employment with GORC – The Local resolved to withdraw from GORC and remain autonomous; the International responded with an audit, a hearing and the placement of the Local under supervision – The Board first found that there was no alteration of jurisdiction by the International: the International in attempting to keep the Local in the GORC, was doing nothing other than giving effect to the jurisdiction voluntarily assumed by the Local – The Board next considered the four factors set out in s. 147(3) for determining whether the International had cause and found in favour of the International having had cause – Further the Board found the International had just cause to assume supervision of the Local – The Local had no legitimate justification for its secession from the International at the outset and the interests of the Local, as distinct from the interests of the individuals, were not impaired or put in jeopardy by the supervision or the process leading to the supervision – Applications dismissed, subject to the issue of whether damages were payable

GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL & ALLIED WORKERS; RE CJA, LOCAL UNION 93 .....(Jan./Feb.) 52

Damages – Construction Industry – Construction Industry Grievance – Practice and Procedure – Reconsideration – The Board was asked to reconsider a default judgment and applied the four factors set out in *Weinmann Electric Ltd.* – The explanation for the default weighed against granting the request since the responding party's failure to respond was due to its own lack of diligence – The other three factors weighed in favour of the responding party: its reconsideration request was filed in a timely fashion; members of another trade union were performing the work in question thereby providing *prima facie* evidence that there existed a good defence on the merits; and the applicant could not claim prejudice given that it did not come to the Board with clean hands in that it failed to notify the other union of the application – Accordingly the Board granted the application and set aside the default judgment – Grievance continues

BLACK & MCDONALD LIMITED; RE IBEW, LOCAL 120 .....(Jan./Feb.) 1

Damages – Employment Standards – Reprisal – The applicant claimed he was terminated for insisting on receiving public holiday pay under the Act – Shortly after the applicant had challenged the company's treatment of holiday pay, the company reduced the applicant's shifts – The company provided the Board with no explanation of this reduction in work – Four weeks later, after a heated argument with a manager, the applicant was terminated – The Board found the reduction in shift work and the termination were both reprisals under the Act – The Board ordered the company to pay the applicant lost wages for loss of shift work and, subject to mitigation, his lost wages between termination and the finding of another position

KEROMENA HOLDINGS LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE MUHAMMAD JAMIL KHATTAK..... (Mar./Apr.) 179

Discharge – Construction Industry – Construction Industry Grievance – In this discharge grievance, the grievor had 15 years' seniority, although his service with the responding party was less than three years at the time of his termination – The grievor was involved in three disciplinary incidents: the first was a physical altercation with another employee; the latter two incidents involved creating a disturbance in a client's security office and damaging equipment (entry key, pager) – The client barred the grievor from its premises and he was discharged – With respect to the two culminating incidents, the Board found that they were more than minor in nature – However, the Board found that the grievor had not generated any problems during his first two years of employment with the responding party and that he expressed genuine remorse over the final incident – While it is significant when a client bars a grievor from its premises, the Board held that such an action is not determinative of the matter – The Board found that progressive discipline was appropriate in this case – Accordingly, the Board reinstated the grievor, but treated the period of time from the discharge to the date of the Board decision as a period of suspension without pay – Application granted

OTIS CANADA INC. ; RE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, LOCAL 96..... (Mar./Apr.) 268

Discharge – Construction Industry Grievance – Practice and Procedure – The applicant grieved the discharge of two employees who were fired for allegedly smoking marijuana during their lunch break – The respondent sought to admit videotape surveillance it alleged depicted the grievors smoking marijuana in their truck located offsite of the employer's property – The applicant opposed the admission of the videotape on the basis that it violated the grievors' right to privacy and because the videotape was not produced in a timely manner – The Board considered two lines of arbitral authority on the admission of videotape surveillance: admission where the surveillance is relevant and admission where the surveillance is not conducted unreasonably or for an unreasonable purpose – The Board adopted the reasonableness test and found the surveillance was unreasonable for lack of sufficient motivation – A "feeling" that something is not right is no substitute for clear and reasonable grounds when employees are off duty and away from the worksite – The respondent had a less intrusive alternative to surveillance because it had an opportunity to observe the grievors' work performance but failed to observe such performance – Finally, there was a reasonable expectation of privacy because the grievors were in their own vehicle – On the issue of delay of production, the Board held it was open to counsel to obtain a production order – Matter continues

THYSSENKRUPP ELEVATOR (CANADA) LIMITED; RE IUEC, LOCAL 50 (May/June) 431

Discharge – Discharge for Union Activity – Interim Relief – Remedies – Unfair Labour Practice – Two union organizers were terminated in the midst of an organizing campaign and the union asked the Board to reinstate them on an interim basis pending resolution of the complaint – The employer argued it had terminated the two employees for cause, based on allegations of absenteeism and various performance and attitude issues – Neither of the employees had ever been disciplined nor had they received complaints from the employer prior to their terminations – The employer was aware that the two individuals were union supporters – The employees were notified about their terminations through email messages – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint – In doing so, the Board acknowledged that the period of time between an application for certification and the ultimate disposition is a particularly

difficult one for a union in terms of maintaining the confidence of its supporters – The Board found the union would suffer irreparable harm in terms of erosion of support if interim relief of reinstatement was not granted and that the balance of harm favoured granting the order – Interim reinstatement ordered

AXA ELECTRIC INC.; RE IBEW LOCAL 353 .....(Nov./Dec.) 766

Discharge – Duty of Fair Representation – The applicant alleged the union breached section 74 in connection with its failure to properly represent him in three terminations – The Board found the union did not violate the Act when it made decisions that were advantageous to the applicant – The union acted reasonably when it accepted the employer's offer to compensate the applicant between hearings for the applicant's second and third terminations; when it advised the applicant to accept an agreed statement of facts at arbitration; and when it entered into a Letter of Understanding with the employer – In its assessment of whether section 74 had been breached, the Board considered the grievor's conduct and found the applicant was uncooperative and antagonistic towards the union so as to irreparably fracture their relationship – Moreover, the applicant began to disregard the union's instructions and posted notices on the union's website alleging that the union business manager was stealing from the employer – When the union ordered the applicant to remove the postings the applicant ignored the union's warnings – The Board held that where a grievor fails to cooperate with a union, so that the union is unable to productively work with the grievor, or is unable to properly prepare for an arbitration, the union may, in extreme cases, be entitled to withdraw from the grievance – Application dismissed

STEPHANE VERREAULT; RE TEAMSTERS UNION LOCAL 419; RE UA LOCAL 787 .....(May/June) 413

Discharge – Duty of Fair Representation – The applicants challenged their union's settlement of discharge grievances without their consent – After an exhaustive investigation including video surveillance and computer intervention, the employer discharged the applicants for time theft and misuse of company property (the applicants were alleged to have contributed to an alternative workplace website which contained disparaging and false comments regarding the employer and its employees) – The applicants maintained their innocence and objected to any settlement overtures – The Board held that a s. 74 application is not a substitute for arbitration; the process is not a forum for assessing the correctness of the union's decisions, and the trade union is well within its rights to settle a grievance absent the grievor's consent – Finally, the Board found no violation of s. 87 of the Act when the union discontinued an internal appeal once the applicants had launched the instant complaint – Application dismissed

ANDREW BIRNIE et al; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 222; RE ACSYS AUTOMOTIVE COMPONENT SYSTEMS OF CANADA A DIVISION OF BBK, MICHIGAN .....(May/June) 317

Discharge – Employment Standards – Reprisal – The Board reviewed an employment standards officer's finding that the claimant's termination did not result from a reprisal contrary to section 74 of the Act – The employer argued the claimant was terminated solely for circulating a petition to disband the dock committee – Circulating a petition was found not to be a protected activity under section 74 – The Board found however, that the petition was not the only reason for termination – The employee engaged in protected activity when he discussed hours of work and other rights under the Act with his

coworkers – The employer was aware that the claimant was engaged in those discussions – The employer penalized the employee by way of termination – The employer intended to terminate because of those discussions – Remedial issues continue

NATIONAL FAST FREIGHT ; RE KARL M. ELLISON AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (May/June) 389

Discharge – Employment Standards – The employee applied for review of an employment standards officer's refusal to issue an Order to Pay requiring the respondent employer to pay termination pay to the applicant – There was an allegation that the applicant was fired for drinking on the job: on his lunch break, the employee started to drink a beverage containing 0.5% alcohol he had purchased from the grocery store; he proceeded to finish his beverage after lunch while at work behind the counter – The employer claimed that the consumption of alcohol while on the job constituted wilful misconduct – The Board held that an employee who consumes a beverage that he purchased at a grocery store and which contained 0.5% alcohol is not engaging in an act of wilful misconduct – The Board further held that if the employer had concerns regarding its customers' perception of the consumption of this kind of beverage in the workplace, the employer should regulate or prohibit the behaviour in question, specifying consequences for failing to adhere to the prohibition – There was no evidence that such a rule was in place in this matter and no such policy had been communicated to the employee – Application allowed

BYERS TRACTOR SUPPLY AND DIRECTOR OF EMPLOYMENT STANDARDS; RE BRENT TIPPING ..... (July/Aug.) 490

Discharge – Interim Relief – Unfair Labour Practice – Both the unfair labour practices complaint and the application for interim relief sought the reinstatement of an employee, who, the IBEW argued, was terminated because of assisting IBEW in an active organizing drive of K2 employees – The Board found the employer's action took place during an organizing campaign and that the pending application raised a serious issue – Although the Board had serious concerns with whether IBEW could establish irreparable harm on the basis of chill to other employees, the Board did find that the union would suffer irreparable harm if the employee, as an insider organizer, was not reinstated – However the Board found that it appeared that the lay-off, suspension or discharge of the employee was unrelated to the exercise of rights under the Act for the following reasons: the employee had only worked for K2 for two hours before leaving for personal reasons; K2's reasons for not rehiring appeared reasonable (a practice for new employees precluded his return one week, and a mistaken belief about a contravention of the *TQAA*, precluded his return the next) – Additionally, IBEW's material attempting to link the non-return to the exercise of rights was problematic – Accordingly, section 98(3) precluded an order of reinstatement – Interim Application dismissed

K2 ELECTRICAL CONTRACTING LTD.; RE IBEW, LOCAL 105 ..... (May/June) 375

Discharge – Interim Relief – Remedies – Unfair Labour Practice – OLGC discharged a part-time Security Officer, who was a supporter of the union's organizing campaign, as a result of a pattern of unpredictable, volatile and disruptive behaviour – The parties agreed that the events occurred during an organizing campaign and there was a serious issue to be tried – On balance of harm the Board found that the interim reinstatement of the security officer would expose OLGC to unreasonable risk since the security officer may not be able to perform his duties safely and appropriately and he could be disruptive in the workplace – Furthermore since the union's organizing drive commenced 18 months prior to the security officer's discharge, the application was filed over two weeks after the

discharge, and there were no substantial allegations that he was a key inside organizer, the Board found there was not significant harm to PSAC – Accordingly, the Board did not find the balance of harm favoured granting the interim application – Application for interim relief dismissed

ONTARIO LOTTERY AND GAMING CORPORATION; RE PUBLIC SERVICE ALLIANCE OF CANADA .....(Jan./Feb.) 95

Discharge – Interim Relief – Unfair Labour Practice – The union sought interim reinstatement of its key inside organizer, McDonell, who was discharged during an organizing drive – The employer claimed it knew nothing of the organizing drive and that McDonell was fired for the rude and belligerent way he complained about the "swing shift system" – The Board found an appearance of a causal relationship between McDonell's termination and his exercise of rights under the Act because of the following elements: he was a 6 year employee with no discipline record; he had complained before about the "swing shift system" without discipline; other employees complained, even rudely, and were not disciplined; the organizing drive had lasted a few weeks involving some 30 employees and hence it was likely the employer was aware of it; the ostensible reason for the termination was closely related to the lawful activities of discussing working terms and conditions – The other criteria set out in s. 98.1 were met and the Board ordered interim reinstatement, among other orders – Relief granted

CORNWALL GRAVEL CO. LTD.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527 ..... (May/June) 332

Discharge for Union Activity – Bargaining Rights – Interim Relief – Remedies – Unfair Labour Practice – The union sought interim reinstatement pursuant to section 98 of an employee who, the union asserted, was an inside union organizer and was discharged for her organizing activity – The employer asserted that the employee was terminated due to her own misconduct (using profanity on the production floor) in accordance with its policies and procedures and without anti-union animus – The Board was satisfied that interim relief was necessary to prevent irreparable harm or to achieve other significant labour relations objectives, as her termination, as a supporter of the union and key inside organizer, may have a detrimental effect on the union's organizing drive – The Board was not concerned that the reinstatement of the employee could put the business at risk for the following reasons: the company did not immediately remove the employee from the workplace when it learned of the transgression, although it could have under its policy; the employee swore 4-5 times in four years, but only one time was it on the production floor and the company concedes that one instance of swearing on the production floor does not always result in termination; and lastly, there was no suggestion that there had ever been a client complaint arising out of the employee's use of profanity – In regards to s. 98(3), where there are numerous and significant factual disputes, the Board stated that it must assess the two stories and ask itself whether it appears the conduct of the employer is (applying the Board's experience) that of an employer which is engaged in a process free of anti-union animus – The Board held that it did not appear that the employer's decision to discharge the employee was unrelated to her exercise of rights under the Act and reinstatement is therefore an appropriate remedy – Reinstatement and posting ordered

SITEL CUSTOMER CARE INC.; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ..... (July/Aug.) 625

Discharge for Union Activity – Discharge – Interim Relief – Remedies – Unfair Labour Practice – Two union organizers were terminated in the midst of an organizing campaign and the union asked the Board to reinstate them on an interim basis pending resolution of the complaint – The employer argued it had terminated the two employees for cause, based on allegations of absenteeism and various performance and attitude issues – Neither of the employees had ever been disciplined nor had they received complaints from the employer prior to their terminations – The employer was aware that the two individuals were union supporters – The employees were notified about their terminations through email messages – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint – In doing so, the Board acknowledged that the period of time between an application for certification and the ultimate disposition is a particularly difficult one for a union in terms of maintaining the confidence of its supporters – The Board found the union would suffer irreparable harm in terms of erosion of support if interim relief of reinstatement was not granted and that the balance of harm favoured granting the order – Interim reinstatement ordered

AXA ELECTRIC INC.; RE IBEW LOCAL 353 .....(Nov./Dec.) 766

Discharge – Employment Standards – Rostrust Investments Inc. asked the Board to review four orders to pay in relation to the termination of four employees – The applicant owned a building complex and leased it to Public Works and Government Services Canada (PWGSC) – Pursuant to a contract, the applicant provided management, cleaning and maintenance services to the leased space where the employees worked – PWGSC terminated this contract and decided to provide these services directly – As a result, the applicant terminated the four employment contracts – Each respondent commenced employment with PWGSC – The applicant employer claimed five grounds to be relieved of its duty to pay termination pay: a) the respondents were given notice, b) the respondents resigned by accepting jobs with PWGSC, c) the applicant fell within the purview of Section 10 of the Act as they were a "building services provider", d) there was a sale of business, and e) termination pay would constitute a windfall as they respondents suffered no damages – The Board determined that the "sale of business" and "building service provider" provisions of the Act do not apply when the purchaser or new provider is subject to federal labour jurisdiction – Orders to Pay upheld – Applications dismissed

ROSTRUST INVESTMENTS INC./ INVESTISSEMENTS ROSTRUST INC.; RE TERRY DOXTATER, MARC PLOUFFE, RAYMOND CONLON, DARYL HARGROVE AND DIRECTOR OF EMPLOYMENT STANDARDS .....(Nov./Dec.) 813

Duty of Fair Representation – Discharge – The applicant alleged the union breached section 74 in connection with its failure to properly represent him in three terminations – The Board found the union did not violate the Act when it made decisions that were advantageous to the applicant – The union acted reasonably when it accepted the employer's offer to compensate the applicant between hearings for the applicant's second and third terminations; when it advised the applicant to accept an agreed statement of facts at arbitration; and when it entered into a Letter of Understanding with the employer – In its assessment of whether section 74 had been breached, the Board considered the grievor's conduct and found the applicant was uncooperative and antagonistic towards the union so as to irreparably fracture their relationship – Moreover, the applicant began to disregard the union's instructions and posted notices on the union's website alleging that the union business manager was stealing from the employer – When the union ordered the applicant to remove the postings the applicant ignored the union's warnings – The Board held that where a grievor fails to cooperate with a union, so that the union is unable to

productively work with the grievor, or is unable to properly prepare for an arbitration, the union may, in extreme cases, be entitled to withdraw from the grievance – Application dismissed

STEPHANE VERREAULT ; RE TEAMSTERS UNION LOCAL 419; RE UA LOCAL 787 ..... (May/June) 413

Duty of Fair Representation – Discharge – The applicants challenged their union's settlement of discharge grievances without their consent – After an exhaustive investigation including video surveillance and computer intervention, the employer discharged the applicants for time theft and misuse of company property (the applicants were alleged to have contributed to an alternative workplace website which contained disparaging and false comments regarding the employer and its employees) – The applicants maintained their innocence and objected to any settlement overtures – The Board held that a s. 74 application is not a substitute for arbitration; the process is not a forum for assessing the correctness of the union's decisions, and the trade union is well within its rights to settle a grievance absent the grievor's consent – Finally, the Board found no violation of s. 87 of the Act when the union discontinued an internal appeal once the applicants had launched the instant complaint – Application dismissed

ANDREW BIRNIE et al; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 222 ; RE ACSYS AUTOMOTIVE COMPONENT SYSTEMS OF CANADA A DIVISION OF BBK, MICHIGAN ..... (May/June) 317

Duty of Fair Representation – Judicial Review – The applicant sought judicial review of a decision of the Board and its subsequent reconsideration – The issue before the Court was whether the Board erred in denying the Applicant's claim that UFCW, Local 1000A breached its duty of fair representation pursuant to s. 74 of the Act – The Applicant's complaint arose from mid-term amendments to the collective agreement negotiated by Loblaws Local 1000A that were unanimously ratified by a group of primarily elected division officers – The Union then agreed to the amendments which were opposed by the Applicant on a number of grounds, including that the Union did not properly consult its membership or hold a ratification vote of the mid-term amendments pursuant to s. 44 of the Act – The Court held that the Board was not patently unreasonable in reaching its conclusion in both its decision and reconsideration – The Court stated that the Board properly pointed out that the Union members, including the Applicant, could express their views when the Collective Agreement comes up for renewal – The Court concluded that the Union acted reasonably and fairly in negotiating the mid-term amendments to the Collective Agreement, given the competition faced by Loblaws and the business climate of the day – Application dismissed

BENJAMIN BLASDELL; RE ONTARIO LABOUR RELATIONS BOARD; UNITED FOOD AND COMMERCIAL UNION A.F.L-C.I.O-C.L.C., LOCAL 1000A; LOBLAW'S SUPERMARKETS LIMITED .....(Jan./Feb.) 113

Duty of Fair Representation – Judicial Review – The Board had dismissed four duty of fair representation complaints by the applicant against his union – The court found that the standard of review was patent unreasonableness and that the Board's decisions not only met that test, but were all correct – Application dismissed

GRANTLEY, HOWELL ; RE UNITED STEELWORKERS OF AMERICA, LOCAL 7135; OLRB..... (Mar./Apr.) 304

Duty of Fair Representation – Judicial Review – The Court held that a dismissal of a duty of fair representation complaint for delay was subject to a standard of patent unreasonableness – The Board's unpublished rule of thumb regarding delay was presumptive only, and the Board gave consideration to applicable criteria – There was nothing clearly irrational or so flawed in the Board's ruling to cause the Court to interfere with the decision – Application dismissed – Leave to appeal to Court of Appeal dismissed – Leave to appeal to Supreme Court of Canada dismissed

JAMAL, NASEEM; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION AND THE OLRB ..... (May/June) 474

Duty of Fair Representation – Practice and Procedure – After dismissing two s. 74 complaints, the Board notes that the applicant has filed a number of applications at the Board and other tribunals, all of which relate to his disagreement with an arbitral decision dealing with the employer's duty to accommodate – The Board made a direction that the applicant may not bring another complaint against the union without leave of the Board – Applications dismissed

NEDELKOPOULOS, GUS; RE CAW-CANADA, LOCAL 222 ..... (Jan./Feb.) 89

Duty of Fair Representation – Reconsideration – The union and employer sought reconsideration of a Board decision ordering that the applicant's grievance proceed to arbitration – Both the union and the employer stated they had not received notice of the consultation that gave rise to the decision – The parties submitted that the grievance had been taken to arbitration – The Board held that it was not necessary for it to determine whether or not the notice of consultation had been received by the union or the employer: if it was not, the Board's earlier decision would have to be set aside; if it was, the Board was satisfied that the union and employer had previously demonstrated an intention to participate in the proceeding; their failure to attend was inadvertent; the applicant cannot be prejudiced because his matter proceeded to arbitration – Reconsideration granted

MARK WILSON; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION & GENERAL WORKERS UNION OF CANADA (CAW-CANADA) & ITS LOCAL 222 ; RE A.G. SIMPSON AUTOMOTIVE SYSTEMS ..... (Mar./Apr.) 302

Duty of Fair Referral – Unfair Labour Practice – Three members of IUBAC Local 20 complained that BACU, Local 2 (the union administering the relevant collective agreement) violated section 75 of the Act when it refused to investigate or take any action against contractors who encroached on Local 20's jurisdiction with their own crews rather than availing themselves of the hiring hall – BACU and IUBAC were vying for membership at this time, but the Board found no evidence that BACU knew the individuals might be IUBAC supporters – The Board confirmed that a union may take its institutional interests into account when deciding whether to pursue a grievance or seek to enforce a collective agreement – In any event, the complainants were unable to establish that they would have been dispatched to the jobs even if the collective agreement had been enforced – Application dismissed

BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 2 ; RE SHAWN DEVLIN ET AL ..... (July/Aug.) 480

Duty to Bargain in Good Faith – Construction Industry – Standing – Unfair Labour Practice – To secure itself a subcontractor to install cedar shingles, SLR signed a collective agreement with the Carpenters, after having been told by the subcontractor that the Residential Roofing Agreement was standard across the province and included a letter of understanding specifying wage rates for cedar shingling – After the subcontractor abandoned its contract with SLR, and SLR was forced to pay another entity higher rates to complete the work, SLR complained that both the subcontractor and the Carpenters had violated sections 17 and 70 of the Act, because the agreement SLR was given to sign was not in fact standard across the province – The Board held that an employer has no standing to bring a complaint under s. 70, so that element of the application was dismissed – With respect to the duty to bargain in good faith, the Board found that the Carpenters did not hold bargaining rights for the employees at the time that bargaining with SLR took place, so no such duty arose in the circumstances – Application dismissed

S.L.R. ROOFING AND SHEET METAL; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE ROBERT SHEWELL; RE 6221220 CANADA INC. O/A JIM'S ROOFING AND JIM LEBLANC .....(Nov./Dec.) 832

Duty to Bargain in Good Faith – Interference in Trade Union – Strike – Unfair Labour Practice – The union argued that the employer had breached its duty to bargain in good faith and had interfered in the administration of the union – In the context of a plant closure following a strike, the employer had proposed that employees who were at work when the strike commenced were not entitled to severance pay or, alternatively, their entitlement should be capped at $11,000 – The Board found that because of the imbalance of bargaining power in this relationship (the union had lost the strike and was negotiating a back-to-work and subsequent closure agreement, so the employer clearly had the upper hand), the employer's proposal to cap severance entitlements could not be taken to impasse – In the context of a plant closure, with the union in a significantly weakened position, minimum employment standards take on increased importance for employees – To conclude that the employer could take the proposal of the cap to impasse would render the employees' statutory rights illusory – Application granted in part

FLEET INDUSTRIES, MAGELLAN AEROSPACE LIMITED; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, FRONTIER LODGE 171 AND RIVERSIDE LODGE 939.....(Jan./Feb.) 45

Employee – Bargaining Unit – Certification – Construction Industry – The union sought to certify all construction labourers of the employer – The employees in dispute cleaned trailers at the worksite that contained lunchrooms, washrooms and offices – The employer argued its employees were engaged in "cleaning" and not "clean-up" and were performing the same work they would in a private residence or doctor's office – The Board refused to make the distinction urged upon it by the employer, finding that the cleaning of the construction trailers was a necessary support for the various trades on site – Certification granted

646849 ONTARIO LTD. C.O.B. AS MAGIC MAID CLEANING SERVICES ; RE LIUNA, LOCAL 1089..... (July/Aug.) 475

Employee – Bargaining Unit – Certification – Construction Industry –Status – The union applied to certify employees of the responding party in all sectors of the construction industry other than ICI – At the outset of the hearing, the parties agreed that the first issue to be dealt with was whether employees performing general landscape maintenance were

working in the bargaining unit on the date of application – The employer sought to rely on a standard industry collective agreement which purported to include the work the employees were performing in the definition of construction work – The Board found that routine grounds maintenance at a site where no construction work was being carried out could not constitute "construction industry" work for purposes of the certification application – The Board held it could not look at the expanded definition of construction work in a collective agreement nor at landscaping industry practice to modify the Act or alter the scope of the provision of the Act pertaining to the construction industry – The employees in question were not properly on the list – Matter continues

HANK DEENEN LANDSCAPING LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (July/Aug.) 513

Employee – Certification – Construction Industry – Membership Evidence – Practice and Procedure – Reconsideration – The employer requested reconsideration of the Board's decision to certify the union under s. 128.1 based on membership evidence filed by the union on behalf of more than 55% of the employees in the bargaining unit – The employer filed affidavit evidence, in which each affiant stated they had not signed a union membership card, from three of its five employees who were on the list of employees the Board considered when it made its certification determination – The allegations were specific, detailed and quite serious as they raised an issue of fraud or misrepresentation – The Board noted that at least one of the three affiants appeared to have signed a union membership card, however the Board did not disclose the degree of overlap between the membership evidence and the three affiants nor did it disclose the identity of the person or persons who appeared to have signed a card – The Board set the request for reconsideration down for hearing – Matter continues

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 804

Employee – Certification – Construction Industry – Membership Evidence – Status – The responding party filed a timely response in this application for certification – The employer's primary position was that it had no employees in the bargaining unit because it was not the employer of the persons the applicant had sought to represent; it filed no names on its "Schedule A" – In the alternative, the responding party asserted there were seven more individuals than the four identified in the applicant's materials doing the same work on the application date; at the hearing the responding party sought to add the seven individuals to its "Schedule A" – The Board held that a responding party seeking to assert it is an employer of more individuals than the applicant has proposed must, pursuant to s. 128.1(3), provide the names of those individuals in a timely way, even if its submission relating to those individuals is an alternative position – Employer's motion to file the list of names after the two-day period set out in 128.1(3) dismissed – Matter continues

DESI'S ALUMINIUM CAMBRIDGE; RE CARPENTERS' UNION, CENTRAL ONTARIO REGIONAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA. ..... (Sept./Oct.) 700

Employer – Bargaining Unit – Certification – Representation Vote – In this application for certification, the employer gave numerically significant notice under s. 8.1 of the Act, arguing that workers supplied to it by an employment agency (Manpower) were in fact its employees – The union agreed that if the Manpower workers were found to be employed by Nike, the application would have to be dismissed because the union did not have the

support of 40% of the bargaining unit – The Board considered the criteria articulated in *York Condominium* to determine the identity of the employer – The Board found that Nike bears the ultimate burden of remuneration; Nike has the authority to determine whether a temporary employee continues to work for it; although the employees were hired by Manpower, Nike can tell Manpower not to send back an employee; Nike has the power to dismiss; the degree of integration of the workers supplied by Manpower into Nike's business strongly points to Nike being the employer – Ultimately, the Board concluded that it is Nike which exercises fundamental control over the workers supplied by Manpower – Application dismissed under section 8.1(5)7 of the Act

NIKE CANADA LTD.; RE UFCW, LOCAL 1000A ..... (July/Aug.) 574

Employer Initiation – Bargaining Rights – Termination – In this application for termination of bargaining rights, the union alleged that the employer had involved itself in the campaign, contrary to s. 63(16) of the Act – The union contended that: (1) the employer had knowledge of the application before it was delivered; (2) an employee in the human resources department made telephone calls to bargaining unit members to encourage their participation in the representation vote; and (3) the employer provided information to the applicant to enable him to send campaign literature to bargaining unit members – During the hearing, the employer conceded the first and third allegations, but submitted that neither constituted a violation of the Act – The Board considered all three allegations, holding that the employer's prior knowledge of the application was obtained innocently and the evidence of the employer's provision of employee information to the applicant was circumstantial and not compelling – With respect to the employee's phone calls to bargaining unit members, the Board could not conclude there was any evidence of improper comments – The union's objections were dismissed – Following the counting of the ballots, the termination application was successful

ONTARIO LOTTERY AND GAMING CORPORATION C.O.B. AS THE SLOTS AT FORT ERIE RACETRACK ; RE MICHAEL MCLELLAN ; RE OPSEU LOCAL 278 ..... (May/June) 399

Employer Support – Certification – Representation Vote – Trade Union – In this application for certification the Board considered whether section 15 of the Act was contravened, that is whether the employer provided financial or other support to the applicant – The Board concluded that the Association was precluded from becoming certified for the following reasons: the Association's sole source of start-up and ongoing operating funding was the employer; no dues deductions were authorized; it was not relevant whether the funding was provided directly or indirectly by the employer as it was still financial support; the employer provided free office space, a significant amount of relief time, and paid for all arbitration proceedings; and the Association's membership was limited to non-union employees holding permanent positions thus giving management control of membership through its hiring decisions – All of this amounted to improper employer support – Application dismissed

UNIVERSITÉ D'OTTAWA : RE : ASSOCIATION DES EMPLOYE(E)S DE L'UNIVERSITE D'OTTAWA [AEUO] ..... (May/June) 444

Employment Standards – Grand & Toy challenged an order requiring it to amend its vacation pay policy that provided one annual lump sum payment of vacation pay to employees on a fixed date – The Act requires that employees be given two weeks vacation after the completion of an entitlement year and that a lump sum payment of accrued vacation pay be made prior to the employee's commencement of the vacation – The Board found such

a fixed payment did not violate the Act and in some instances could even be construed as a greater right or benefit – Compliance Order rescinded

GRAND & TOY LIMITED; RE DIRECTOR OF EMPLOYMENT STANDARDS .....(Nov./Dec.) 806

Employment Standards – Damages – Reprisal – The applicant claimed he was terminated for insisting on receiving public holiday pay under the Act – Shortly after the applicant had challenged the company's treatment of holiday pay, the company reduced the applicant's shifts – The company provided the Board with no explanation of this reduction in work – Four weeks later, after a heated argument with a manager, the applicant was terminated – The Board found the reduction in shift work and the termination were both reprisals under the Act – The Board ordered the company to pay the applicant lost wages for loss of shift work and, subject to mitigation, his lost wages between termination and the finding of another position

KEROMENA HOLDINGS LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE MUHAMMAD JAMIL KHATTAK.....(Mar./Apr.) 179

Employment Standards – Discharge – Rostrust Investments Inc. asked the Board to review four orders to pay in relation to the termination of four employees – The applicant owned a building complex and leased it to Public Works and Government Services Canada (PWGSC) – Pursuant to a contract, the applicant provided management, cleaning and maintenance services to the leased space where the employees worked – PWGSC terminated this contract and decided to provide these services directly – As a result, the applicant terminated the four employment contracts – Each respondent commenced employment with PWGSC – The applicant employer claimed five grounds to be relieved of its duty to pay termination pay: a) the respondents were given notice, b) the respondents resigned by accepting jobs with PWGSC, c) the applicant fell within the purview of Section 10 of the Act as they were a "building services provider", d) there was a sale of business, and e) termination pay would constitute a windfall as they respondents suffered no damages – The Board determined that the "sale of business" and "building service provider" provisions of the Act do not apply when the purchaser or new provider is subject to federal labour jurisdiction – Orders to Pay upheld – Applications dismissed

ROSTRUST INVESTMENTS INC./ INVESTISSEMENTS ROSTRUST INC.; RE TERRY DOXTATER, MARC PLOUFFE, RAYMOND CONLON, DARYL HARGROVE AND DIRECTOR OF EMPLOYMENT STANDARDS .....(Nov./Dec.) 813

Employment Standards – Discharge – Reprisal – The Board reviewed an employment standards officer's finding that the claimant's termination did not result from a reprisal contrary to section 74 of the Act – The employer argued the claimant was terminated solely for circulating a petition to disband the dock committee – Circulating a petition was found not to be a protected activity under section 74 – The Board found however, that the petition was not the only reason for termination – The employee engaged in protected activity when he discussed hours of work and other rights under the Act with his coworkers – The employer was aware that the claimant was engaged in those discussions – The employer penalized the employee by way of termination – The employer intended to terminate because of those discussions – Remedial issues continue

NATIONAL FAST FREIGHT; RE KARL M. ELLISON AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (May/June) 389

Employment Standards – Discharge – The employee applied for review of an employment standards officer's refusal to issue an Order to Pay requiring the respondent employer to pay termination pay to the applicant – There was an allegation that the applicant was fired for drinking on the job: on his lunch break, the employee started to drink a beverage containing 0.5% alcohol he had purchased from the grocery store; he proceeded to finish his beverage after lunch while at work behind the counter – The employer claimed that the consumption of alcohol while on the job constituted wilful misconduct – The Board held that an employee who consumes a beverage that he purchased at a grocery store and which contained 0.5% alcohol is not engaging in an act of wilful misconduct – The Board further held that if the employer had concerns regarding its customers' perception of the consumption of this kind of beverage in the workplace, the employer should regulate or prohibit the behaviour in question, specifying consequences for failing to adhere to the prohibition – There was no evidence that such a rule was in place in this matter and no such policy had been communicated to the employee – Application allowed

BYERS TRACTOR SUPPLY AND DIRECTOR OF EMPLOYMENT STANDARDS; RE BRENT TIPPING ..... (July/Aug.) 490

Employment Standards – Judicial Review – The applicant employer sought judicial review of the Board's decision upholding the employment standards officer's finding that the employee was entitled to severance pay – The standard of review of a decision of the Board interpreting the *Employment Standards Act, 2000* is reasonableness – The Court held that it was reasonable for the Board to find that six months' notice of termination and a 25% stay bonus did not satisfy the severance pay obligation under the *Act* – There was no greater right or benefit in the employer's payment arrangements with the employee: the severance payment obligation is distinct from the obligation to give notice of termination under the *Act* – The Court also held that the Board was reasonable in finding that an offer to relocate from Toronto to Kingston, even with relocation expenses provided, was not an offer of reasonable alternative employment as contemplated by section 9(1)4 of Regulation 288/01 – Application for judicial review dismissed

ASSURANT GROUP; RE: IGNACIA MENOR FILLION; DIRECTOR OF EMPLOYMENT STANDARDS ; ONTARIO LABOUR RELATIONS BOARD .....(Jan./Feb) 110

Employment Standards – Related Employer – Three applicant companies appealed the employment standard officer's order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to "C", a bankrupt company, and should be treated as one employer pursuant to s. 4 – The Board found that s. 4 requires a finding that both subsections (a) and (b) must be answered positively before there is a declaration of one employer under the section – There must be more than the mere fact that one company is solvent and the other not, before it amounts to an "effect" under the Act – That is, there must be some connection between the relationship and the insolvency – The Board found there was no evidence that the insolvency of C was caused or affected by its relationship with two of the companies, nor any evidence that any action taken in respect of the third company had the effect, either indirectly or directly, on the entitlements of the employees – Finally, the Board noted that it would not examine whether the principal of C personally had more money to invest in the company, since it would be inappropriate to examine the actions or holdings or personal worth outside the corporation – Application granted; direction to return the monies held in trust

NOVAQUEST FINISHING INC.; RE ABDURAHMAN ABDOULRAB, JOSEPHINE ADRES, ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Mar./Apr.) 248

Employment Standards – Termination – This was an employee application under the *ESA, 2000* for review of a refusal to issue an Order to Pay termination and severance pay – After suffering a workplace injury, the employee did not work again for the responding party past February 28, 2003, although he continued to remain employed – On February 1, 2005, the responding party mailed him a pre-printed pension form replete with references to termination, both within the heading and throughout the various sections – The Board found that the most probable interpretation of the pension form was that the responding party unilaterally severed the applicant's employment consistent with the definition of "severance" under section 63(1)(a) – Whether or not it intended to sever the applicant's employment was immaterial – The Board also held that, in light of section 9(2)(b) of *O. Reg. 288/01*, the doctrine of frustration did not apply in this case to prevent the applicant's entitlement to severance – The onus was on the party raising the defence of frustration to demonstrate that the applicant's severance was not prohibited by the *Human Rights Code* – To succeed, the party was required to demonstrate that it had accommodated the applicant's injury to the point of undue hardship – This threshold had not been reached in this case – Since the applicant's severance pay entitlement comprised the monetary limit set by section 103(4), the Board concluded that it was unnecessary to determine whether the applicant was also entitled to termination pay – Application granted

RAINBOW CONCRETE INDUSTRIES LTD.; RE MARC BARRETTE AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Mar./Apr.) 279

Employment Standards – The employee appealed the refusal to issue him an order for termination and severance pay – The employment standards officer found the employee was guilty of wilful misconduct for driving the employer's truck while his licence was suspended for unpaid fines – The Board upheld the refusal to issue an order, finding that the employee had failed to pay his outstanding speeding tickets and had not advised the Ministry of Transportation of his change of address in accordance with the *Highway Traffic Act*, so his licence suspension could have been properly delivered to him – The employee's assertion that he did not know about the suspension did not absolve him of the wilful misconduct - Application dismissed

BRICK WAREHOUSE LP, THE, DIRECTOR OF EMPLOYMENT STANDARDS; RE JEFFREY DE'ATH ..... (Jan./Feb) 12

Employment Standards – The employer claimed that the respondent was not entitled to overtime since she failed to observe the company's policy, which prohibited employees from engaging in work beyond the regular work period, and required authorization from the supervisor for any overtime – The employer also argued that the Employment Standards Officer should not have considered meal periods in any calculation of overtime – The respondent claimed that she repeatedly obtained verbal permission to do overtime work, and did not receive an uninterrupted lunch period throughout the course of her employment – The Board determined that, in light of subsection 6(1) of *O. Reg. 285/01*, the applicant's policy on overtime did not exclude the respondent from obtaining accumulated overtime pay – The Board found that it was appropriate to include in the overtime calculation that period of time where the respondent did not have the opportunity to take an uninterrupted meal period – Application granted, in part

TCS EXPRESS INC. ; RE ROBINA YASIN AND DIRECTOR OF

EMPLOYMENT STANDARDS ..... (May/June) 424

Employment Standards – The employer sought review of an order to pay for the sole purpose of setting aside the statutory administrative fee, taking the position that the employment standards officer ought to have provided it with an opportunity to pay the amount of the outstanding wages prior to issuing the order – The Board noted that the Act provides, and Branch policy recognizes, that an officer has discretion to afford an employer an opportunity to pay voluntarily, before issuing an order that attracts an administrative fee – Although on the record it was not apparent to the Board why the officer did not provide the employer with an opportunity to make a voluntary payment, the Board found that even if it had the jurisdiction to review the officer's exercise of discretion, it would not be appropriate in this case because: the employer took no steps to pay the arrears even though it knew unpaid holiday pay was owing; it only paid the arrears as a result of an audit; and the payment was not made promptly or even within thirty days – Order to pay affirmed

LOUIE'S PIZZERIA & RESTAURANT ; RE BARBARA L. DAVIES ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Sept./Oct.) 736

Evidence – Bargaining Rights – Construction Industry – Practice and Procedure – Termination – When the IBEW objected to the evidence of employee wishes supplied by the applicant and the Board determined that only photocopies had been filed with the application, the applicant was able to produce the original document to overcome the objection since there were no other defects in the application materials – The Board held that one copy of the employees' wishes was adequate for multiple applications: it is not necessary for employees signing an expression of their wishes to stipulate the Board Area or sector of the construction industry in which they are working in order to make clear that they do not want to be represented any longer by their bargaining agent – The wording of the document providing evidence of the employees' wishes must be sufficient to show the intention – Matter continues

JLY ELECTRIC LTD. ; RE ERNIE PICKARD ; IBEW, LOCAL 105; IBEW CONSTRUCTION COUNCIL OF ONTARIO ..... (Sept./Oct.) 710

Fraud – Certification – Membership Evidence – In this displacement application for certification, the incumbent (CHCW) alleged that the applicant (SEIU), in gathering and submitting membership evidence, had engaged in conduct that amounted to fraud – The Board held that a challenge to membership evidence can only be considered in the context of s. 64 of the Act – The allegations were: (a) an SEIU organizer told employees union membership was a condition of employment; (b) some membership applications were received by mail but bore "witness" signatures; (c) the Board's Form A-4 did not disclose that certain cards were mailed in, nor did the declarant or his collectors make the appropriate inquiries of the signatories; and (d) some employees sought the return of their SEIU memberships but the union refused – The Board reiterated its longstanding distinction between a party's misrepresentations to employees and those made to the Board – Only the latter constitute fraud on the Board and only in circumstances where the misrepresentations were false and the Board relied on them – Allegations (a), (b) and (d) did not amount to fraud on the Board. Nor did the omission regarding mailed-in cards – With respect to the failure to make appropriate inquiries and CHCW's evidence of three individuals who asserted they had not been asked about their membership cards, the Board held that this was insufficient evidence to deny the holding of a representation vote and in any event the vote was an expression of the true wishes of the employees – Furthermore, there were no allegations that any of the cards had not been signed by the

actual employees – Certificate issued

OAKWOOD RETIREMENT COMMUNITIES INC.; RE SEIU LOCAL 1.ON; RE CANADIAN HEALTH CAREWORKERS (CHCW) ..... (Mar./Apr.) 262

Health and Safety – The applicant employer appealed and sought a suspension of an Order requiring it to provide a readily available hard copy of material safety data sheets (MSDS) to all workers who are potentially at risk of exposure to hazardous materials – In its submissions on the suspension request, the employer argued that the workers have easy access to MSDS through a CD-Rom program and computer system; that it would be too onerous to maintain, regularly update and locate correct MSDS using a hard copy version; and that whatever retrieval problems existed with the computer system had been corrected since the Inspector's visit – An employee member of the Joint Health and Safety Committee filed a response in support of the employer's position, submitting that the current CD-Rom program is more time efficient and accessible for workers than the prospect of searching through the hard copy for MSDS – The Board found that the employer would suffer harm if it was required to comply with the Order pending the appeal; the suspension of the Order would not endanger worker safety because the company's retrieval system appeared to allow workers to quickly access the correct MSDS; and the applicant had *prima facie* grounds for a successful appeal – Suspension request granted

UNITED LUMBER & BUILDING SUPPLIES CO. LTD.; RE DOUGLAS WEST, INSPECTOR ..... (May/June) 441

Health and Safety – The appellant sought suspension of a series of stop work orders prohibiting it from carrying out any work on a historical property in Stratford – The orders, originally issued in 2002, were the subject of varied and prolonged litigation, including an *ex parte* injunction and contempt proceedings, but were never appealed to the Board at that time – Following a court ruling, the Ministry re-issued the orders and the appellant appealed and sought this suspension – The Board considered the court's decision and found that a suspension would not assist the appellant since the court stated the injunction would remain in place until the Board disposed of the appeal – Suspension denied – Appeal to be set down for hearing

1353837 ONTARIO INC./LAWRENCE RYAN; RE PETER MARTIN AND JOHN DENNIS ..... (Sept./Oct.) 648

Health and Safety – The employer appealed an inspector's orders requiring a professional engineer to test and report on steel work platform brackets used in scaffolding equipment – The employer argued that the inspector's order directing that all productive work on the site stop pending the report was too broad and beyond the inspector's jurisdiction – The Board, applying a purposive approach to the interpretation of the Act, found that the professional engineer was required to both test and report on the affected equipment – The Board also considered the requirements of s. 57(3) of the Act ("An order... shall indicate generally the nature of the contravention and, where appropriate, the location...") to find that a mere recitation of the statute or regulation will not inform an employer of its alleged violation – The Board restricted the orders to the broken and damaged steel brackets and not the employer's entire operation – Matter referred to labour relations officer

EDVAC CONTRACTING LTD.; RE UNIVERSAL WORKERS UNION, LOCAL 183 AND INSPECTOR DREW ROBERTSON ..... (Jan./Feb) 20

Health and Safety – Construction Industry Grievance – The union grieved the employer's refusal to provide personal and medical information to it following two workplace accidents involving union members – The employer argued the information was protected by the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA") because it was collected in the course of commercial activity and the employer required the individuals' consent to disclose – Additionally, the employer refused to release a copy of the workplace injury report (Form 7), asserting that the union has no obligation to represent workers in their compensation claims, and if the union wanted the information, it could seek the worker's consent – The Board held that a company's collection or disclosure of personal information of its employees for employment-related purposes does not constitute "commercial activity" contemplated in PIPEDA – The Board also held that s. 52(1) of the OHSA pre-dated the passage of PIPEDA, so the latter could not override the provincial legislation – In any event, the duty to disclose was required by law – Grievance granted

E.S. FOX LTD.; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS AND ITS LOCAL 736 .....(Jan./Feb.) 30

Health and Safety – Interim Order – During the course of these union appeals of the refusal of an inspector to issue orders relating to staffing at the jail, the union sought an interim order, effectively asking that the employer comply with a directive it had promulgated with respect to the issue in dispute – The Board, after consulting with the parties, held that this was an appropriate instance in which to exercise its discretion to issue an interim order – Order granted

CENTRAL NORTH CORRECTIONAL CENTRE; RE OPSEU AND INSPECTOR DON BRADFORD.....(Sept./Oct.) 670

Health and Safety – Judicial Review – Reprisal – The employee sought redress for discipline instituted against him arising out of two separate incidents in the workplace – The Board found there was no anti-safety animus on the earlier event, and the applicant had no objective grounds for engaging in a work refusal in the second occurrence – On judicial review the Court held the Board's findings were not irrational and no reviewable error was made – Application dismissed; Board decision not reported

ROOKE, JOSEPH ; RE STELCO HAMILTON AND THE OLRB AND THE MINISTRY OF THE ATTORNEY GENERAL FOR ONTARIO ..... (July/Aug.) 645

Health and Safety – Reconsideration – Timeliness – The applicant sought reconsideration of the Board's decision dismissing its appeal for having filed it beyond the statutory 30-day time limit found in s. 61(1) of the *Occupational Health and Safety Act* – The applicant argued the Board has jurisdiction to "deviate, abridge and extend" the time period set out in the Act if the exercise of discretion relates to procedural requirements – The applicant sought to rely on s. 123 of the *Labour Relations Act, 1995* ("technical irregularity") and s. 4.5 of the *Statutory Powers Procedure Act* ("refusal to process documents") – The Board held that it could not import a provision of the LRA when the OHSA set out a complete code for appeals – Similarly, the Board held that s. 4.5 of the SPPA could not be relied on because the Board had in fact processed the appellant's documents and had dismissed the appeal for having been filed beyond the statutory time limit – Reconsideration denied

LAC DES ILES MINE LTD.; RE USWA; AND INSPECTOR ANDRES JOHANNESSON.....(Sept./Oct.) 715

Health and Safety – Reconsideration – Timeliness – The Board was asked to reconsider its decision dismissing an application appealing an inspector's decision not to make an Order, where the appeal was made beyond thirty days from the inspector's visit to the job site and his refusal to issue an Order, but within 30 days of having received a copy of the Premise/Project Form providing the information that no orders were issued – The Board found that the OHSA only requires a contravention order under s. 57 to be confirmed in writing and nothing requires an inspector to confirm in writing his or her refusal to issue an order – In the absence of a posting of an order the Board found the union reasonably ought to have known that the inspector refused to issue an order – Further the fact that the inspector subsequently faxed the Premise/Project Form to the union did not give rise to a new period of time in which the union could file its appeal – The provision of the Premise/Project Form at a later date does not mean that the inspector's decision occurred at some later time, nor does it provide the union with a new 30-day time period – The time limit begins from the day of the refusal to issue an order – Request for reconsideration dismissed

LASER ELECTRIC AND DIRECT ENERGY AND WENDY GOBEIL, INSPECTOR; RE IBEW, LOCAL 586. ..... (July/Aug.) 551

Health and Safety – Reprisal – An employee filed an application under section 50 of the Act alleging that his employer terminated him after his refusal to continue digging a hole near live electrical cables – Fern Roy Contractors ("FRC") contracted with Transport Personnel Services Inc. ("TPSI"), a staffing agency, for the applicant's services as a general labourer to remove a stone retaining wall on a residential property – The Board determined that FRC's on-site supervisor mishandled the refusal by becoming angry and failing to investigate the applicant's concern while the employer, TPSI, engaged in an unlawful reprisal by terminating the applicant for having sought the enforcement of the Act – The company was ordered by the Board to reinstate the employee immediately and to pay lost wages – Application granted

TRANSPORT PERSONNEL SERVICES INC.; RE AARON MACELWEE; RE FERN ROY CONTRACTORS .....(Jan./Feb) 99

Health and Safety – Timeliness – The applicant sought to appeal an Inspector's Order pursuant to section 61 of the Occupational Health and Safety Act – On July 18, 2006 the Inspector prepared an Investigation Report and six days later the applicant wrote a letter to the Acting Program Manager of the Ministry of Labour raising concerns with the Report – The Acting Manager reviewed the Report and advised the applicant on August 4, 2006 that the employer had taken all reasonable precautions, and five days later provided the applicant with a written description of the appeals process pursuant to section 61 of the Act – The applicant claimed that the Acting Manager's letter dated August 4, 2006 constituted a decision and sought an appeal of it on August 29, 2006 – The Board found that the letter did not convey a decision or communicate the results of an investigation that was conducted under the Act – The Board determined that the application was not filed within 30 days of the Inspector's decision dated July 18, 2006 – The Board confirmed that it does not have the authority to extend the statutory time limit for filing an appeal under section 61(1) – Appeal Dismissed

AVENUE II COMMUNITY PROGRAM SERVICES (THUNDER BAY); RE SHARON FONTAINE; RE DOUGLAS CETTINA, INSPECTOR .....(Nov./Dec.) 761

Human Rights Code – Construction Industry Grievance – The applicant grieved the employer's refusal to accept a referral to work of an employee over the age of 65 – The employer argued that it had established a policy not to "hire or employ" individuals over the age of 65 in November 2004 – The applicant argued that the employer did not consistently apply its policy (the employer had not required any employee who turned 65 to leave the workplace), therefore its application of the policy to the grievor was arbitrary, discriminatory or unreasonable – The Board considered the recent amendments to the Ontario *Human Rights Code* (eliminating mandatory retirement), passed in December 2005 but only coming into effect in December 2006 – Even in the absence of the recent legislative amendments, the Board would have found the employer's actions discriminatory since the policy was not uniformly applied – Grievance allowed

E.S. FOX LTD.; RE UA ..... (May/June) 353

Interference in Trade Union – Duty to Bargain in Good Faith – Strike – Unfair Labour Practice – The union argued that the employer had breached its duty to bargain in good faith and had interfered in the administration of the union – In the context of a plant closure following a strike, the employer had proposed that employees who were at work when the strike commenced were not entitled to severance pay or, alternatively, their entitlement should be capped at $11,000 – The Board found that because of the imbalance of bargaining power in this relationship (the union had lost the strike and was negotiating a back-to-work and subsequent closure agreement, so the employer clearly had the upper hand), the employer's proposal to cap severance entitlements could not be taken to impasse – In the context of a plant closure, with the union in a significantly weakened position, minimum employment standards take on increased importance for employees – To conclude that the employer could take the proposal of the cap to impasse would render the employees' statutory rights illusory – Application granted in part

FLEET INDUSTRIES, MAGELLAN AEROSPACE LIMITED; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, FRONTIER LODGE 171 AND RIVERSIDE LODGE 939.....(Jan./Feb) 45

Interference with Trade Unions – Change in Working Conditions – Unfair Labour Practice – Lock-Out – An application was filed by the union pursuant to section 96, alleging that the responding party had violated sections 70, 72, 73, 76, 83, and 86 of the Act – The collective agreement between the two parties expired on August 31, 2005, and they were in a strike/lock-out position on December 5, 2005 – The responding party did not lock-out its employees – Rather, commencing December 5, it began to pay them in accordance with the new terms and conditions of employment that the responding party had unilaterally implemented – The applicant argued that the employer could not impose terms and conditions of employment until after it had locked-out its employees, and that any implementation of terms and conditions of employment prior to a lock-out constituted direct bargaining with employees contrary to section 73 – The responding party relied on section 86, which in its view gave it the right to change the terms and conditions of employment on the date at which the lock-out period commenced, even if no lock-out actually occurred – The Board agreed with the responding party, holding that once the parties are in a strike or lock-out position, section 86 does not prevent an employer from altering the terms and conditions of employment without the union's consent – Since the responding party altered the terms and conditions of employment only after the lock-out period had commenced, it did not violate section 86 – The Board also held there was no breach of section 73, finding that "altering" working conditions is not the same as "bargaining" directly with bargaining unit employees – The facts also did

not disclose a breach of sections 70, 72, or 76 – As for section 83, since the parties were in a strike/lock-out position, there could be no violation – Application dismissed

NEENAH PAPER COMPANY OF CANADA; RE UNITED STEELWORKERS 1-2693 ..... (Mar./Apr.) 224

Interim Order – Health and Safety – During the course of these union appeals of the refusal of an inspector to issue orders relating to staffing at the jail, the union sought an interim order, effectively asking that the employer comply with a directive it had promulgated with respect to the issue in dispute – The Board, after consulting with the parties, held that this was an appropriate instance in which to exercise its discretion to issue an interim order – Order granted

CENTRAL NORTH CORRECTIONAL CENTRE ; RE OPSEU AND INSPECTOR DON BRADFORD ..... (Sept./Oct.) 670

Interim Relief – Alteration of Jurisdiction – Construction Industry – Damages – Practice and Procedure – Trade Union – Unfair Labour Practice – The Local complained that the International, without just cause and contrary to sections 147 and 149, altered the jurisdiction of the Local and placed it under supervision – The Local also complained that the International represented it in a manner that was arbitrary, discriminatory, or in bad faith – The Board determined that the matter required an expeditious resolution and that this could only be achieved through a consultation – In 2002, as the International restructured into Regional Councils, the Local voluntarily affiliated with GORC (which did not permit Locals to employ persons directly) and remained bound by the International's constitution – In 2005 a dispute arose between the Local and International when three Local officers either resigned or were dismissed from employment with GORC – The Local resolved to withdraw from GORC and remain autonomous; the International responded with an audit, a hearing and the placement of the Local under supervision – The Board first found that there was no alteration of jurisdiction by the International: the International in attempting to keep the Local in the GORC, was doing nothing other than giving effect to the jurisdiction voluntarily assumed by the Local – The Board next considered the four factors set out in s. 147(3) for determining whether the International had cause and found in favour of the International having had cause – Further the Board found the International had just cause to assume supervision of the Local – The Local had no legitimate justification for its secession from the International at the outset and the interests of the Local, as distinct from the interests of the individuals, were not impaired or put in jeopardy by the supervision or the process leading to the supervision – Applications dismissed, subject to the issue of whether damages were payable

GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL & ALLIED WORKERS; RE CJA, LOCAL UNION 93 ..... (Jan./Feb.) 52

Interim Relief – Bargaining Rights – Discharge for Union Activity – Remedies – Unfair Labour Practice – The union sought interim reinstatement pursuant to section 98 of an employee who, the union asserted, was an inside union organizer and was discharged for her organizing activity – The employer asserted that the employee was terminated due to her own misconduct (using profanity on the production floor) in accordance with its policies and procedures and without anti-union animus – The Board was satisfied that interim relief was necessary to prevent irreparable harm or to achieve other significant labour relations objectives, as her termination, as a supporter of the union and key inside organizer, may have a detrimental effect on the union's organizing drive – The Board

was not concerned that the reinstatement of the employee could put the business at risk for the following reasons: the company did not immediately remove the employee from the workplace when it learned of the transgression, although it could have under its policy; the employee swore 4-5 times in four years, but only one time was it on the production floor and the company concedes that one instance of swearing on the production floor does not always result in termination; and lastly, there was no suggestion that there had ever been a client complaint arising out of the employee's use of profanity – In regards to s. 98(3), where there are numerous and significant factual disputes, the Board stated that it must assess the two stories and ask itself whether it appears the conduct of the employer is (applying the Board's experience) that of an employer which is engaged in a process free of anti-union animus – The Board held that it did not appear that the employer's decision to discharge the employee was unrelated to her exercise of rights under the Act and reinstatement is therefore an appropriate remedy – Reinstatement and posting ordered

SITEL CUSTOMER CARE INC.; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ..... (July/Aug.) 625

Interim Relief – Constitutional Law – Intervenor – Judicial Review – Reference – Unfair Labour Practice – The Board considered whether certain provisions of the *Labour Relations Act, 1995* are of no force and effect by reason of either the enactment of a First Nation *Labour Code*, aboriginal or treaty rights, or the First Nation's inherent right to self-government – The Board addressed the concept of aboriginal rights and considered the test to be applied in determining whether a right has been established – Citing *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – Constitutional question answered in the negative – Employer is obliged to bargain and the Minister may appoint a conciliator – On judicial review, the Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the First Nation had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the court held that the Board had the statutory authority to conduct the proceedings as it did – Application for judicial review dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB ..... (May/June) 450

Interim Relief – Discharge – Discharge for Union Activity – Remedies – Unfair Labour Practice – Two union organizers were terminated in the midst of an organizing campaign and the union asked the Board to reinstate them on an interim basis pending resolution of the complaint – The employer argued it had terminated the two employees for cause, based on allegations of absenteeism and various performance and attitude issues – Neither of the employees had ever been disciplined nor had they received complaints from the employer prior to their terminations – The employer was aware that the two individuals were union supporters – The employees were notified about their terminations through

email messages – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint – In doing so, the Board acknowledged that the period of time between an application for certification and the ultimate disposition is a particularly difficult one for a union in terms of maintaining the confidence of its supporters – The Board found the union would suffer irreparable harm in terms of erosion of support if interim relief of reinstatement was not granted and that the balance of harm favoured granting the order – Interim reinstatement ordered

AXA ELECTRIC INC.; RE IBEW LOCAL 353 .....(Nov./Dec.) 766

Interim Relief – Discharge – Remedies – Unfair Labour Practice – OLGC discharged a part-time Security Officer, who was a supporter of the union's organizing campaign, as a result of a pattern of unpredictable, volatile and disruptive behaviour – The parties agreed that the events occurred during an organizing campaign and there was a serious issue to be tried – On balance of harm the Board found that the interim reinstatement of the security officer would expose OLGC to unreasonable risk since the security officer may not be able to perform his duties safely and appropriately and he could be disruptive in the workplace – Furthermore since the union's organizing drive commenced 18 months prior to the security officer's discharge, the application was filed over two weeks after the discharge, and there were no substantial allegations that he was a key inside organizer, the Board found there was not significant harm to PSAC – Accordingly, the Board did not find the balance of harm favoured granting the interim application – Application for interim relief dismissed

ONTARIO LOTTERY AND GAMING CORPORATION; RE PUBLIC SERVICE ALLIANCE OF CANADA .....(Jan./Feb.) 95

Interim Relief – Discharge – Unfair Labour Practice – Both the unfair labour practices complaint and the application for interim relief sought the reinstatement of an employee, who, the IBEW argued, was terminated because of assisting IBEW in an active organizing drive of K2 employees – The Board found the employer's action took place during an organizing campaign and that the pending application raised a serious issue – Although the Board had serious concerns with whether IBEW could establish irreparable harm on the basis of chill to other employees, the Board did find that the union would suffer irreparable harm if the employee, as an insider organizer, was not reinstated – However the Board found that it appeared that the lay-off, suspension or discharge of the employee was unrelated to the exercise of rights under the Act for the following reasons: the employee had only worked for K2 for two hours before leaving for personal reasons; K2's reasons for not rehiring appeared reasonable (a practice for new employees precluded his return one week, and a mistaken belief about a contravention of the *TQAA*, precluded his return the next) – Additionally, IBEW's material attempting to link the non-return to the exercise of rights was problematic – Accordingly, section 98(3) precluded an order of reinstatement – Interim Application dismissed

K2 ELECTRICAL CONTRACTING LTD. ; RE IBEW, LOCAL 105 ..... (May/June) 375

Interim Relief – Discharge –Unfair Labour Practice – The union sought interim reinstatement of its key inside organizer, McDonell, who was discharged during an organizing drive – The employer claimed it knew nothing of the organizing drive and that McDonell was fired for the rude and belligerent way he complained about the "swing shift system" – The Board found an appearance of a causal relationship between McDonell's termination and his exercise of rights under the Act because of the following elements: he was a 6 year employee with no discipline record; he had complained before about the "swing shift

system" without discipline; other employees complained, even rudely, and were not disciplined; the organizing drive had lasted a few weeks involving some 30 employees and hence it was likely the employer was aware of it; the ostensible reason for the termination was closely related to the lawful activities of discussing working terms and conditions – The other criteria set out in s. 98.1 were met and the Board ordered interim reinstatement, among other orders – Relief granted

CORNWALL GRAVEL CO. LTD.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527 ..... (May/June) 332

Intervenor – Constitutional Law – Interim Relief – Judicial Review – Reference – Unfair Labour Practice – The Board considered whether certain provisions of the *Labour Relations Act, 1995* are of no force and effect by reason of either the enactment of a First Nation *Labour Code*, aboriginal or treaty rights, or the First Nation's inherent right to self-government – The Board addressed the concept of aboriginal rights and considered the test to be applied in determining whether a right has been established – Citing *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – Constitutional question answered in the negative – Employer is obliged to bargain and the Minister may appoint a conciliator – On judicial review, the Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the First Nation had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the court held that the Board had the statutory authority to conduct the proceedings as it did – Application for judicial review dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB ..... (May/June) 450

Intimidation and Coercion – Certification – Standing – Unfair Labour Practice – The employer filed an unfair labour practice complaint, alleging that the responding party (CAW) intimidated its employees into voting in favour of the CAW during the representation vote – The applicant requested that the CAW's certification application be dismissed or that the Board order a second representation vote – The CAW argued that the applicant did not have standing to bring the application; in the alternative that it had waived its right to do so; and finally that no *prima facie* case had been pled in respect of intimidation or coercion – With respect to the first issue, the Board found that the applicant had standing to bring its s. 96 application – The applicant was a party to the certification application, and therefore had a right to make submissions to the Board – On the second issue, the Board held that the applicant did not waive its right to bring a complaint – A waiver of the right to request another representation vote or of the right to request that the Board dismiss the application could only be triggered by an agreement between the two parties that the certification application be dismissed or that a final certificate be issued – Because there was no agreement, there was no waiver – On the final issue, the Board found that there were insufficient facts pled by the applicant to dismiss the certification application or to order a second representation vote – The Board

noted that voters are reasonable and possessed of critical faculties, which enable them to recognize election propaganda for what it is – Further, the Board held that a reasonable voter would understand that the secrecy of the ballot boxes assures the integrity of the expression of voters' wishes – Even if the employer's allegations of intimidation and coercion were proven, the actions of the CAW did not result in the employees being deprived of the ability to express their true wishes – Application for certification granted – Section 96 application remitted back to the parties

MEWS CHEVROLET LTD.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) ..... (Mar./Apr.) 187

Intimidation and Coercion – Unfair Labour Practice – Strike – Two applications were filed pursuant to section 96 of the Act arising from efforts by the CAEA to pressure Blue Man Toronto (BMT) into signing collective agreements with the unions – As part of its campaign, the CAEA issued a directive that its members refrain from performing or auditioning for BMT – Two members of the CAEA on honourable withdrawal status accepted employment with BMT and were subsequently expelled from membership – BMT and these two employees alleged in their applications that CAEA and the other named respondents pressured the employees to quit their employment with BMT, constituting unlawful intimidation and coercion – The employees claimed further that the responding parties called, authorized and/or attempted to cause an unlawful strike by pressuring the employees to quit their employment with BMT, and also, that CAEA violated section 85 by expelling them for refusing to engage in an unlawful strike – The Board dismissed the claim under section 76 on the grounds that the Act does not provide for nor protect a right of an employee to work for an employer contrary to the rules and/or directives of their union while retaining membership in the union at the same time – The Board also declined to grant relief under ss. 81 or 83 as the necessary elements of a "strike" as defined under section 1(1) of the Act were not made out – Finally, with respect to the alleged breach of section 85, the Board held that the directive by the CAEA and the subsequent expulsion from membership of the two employees did not disclose any violation of the Act, as the internal administration of a union constitution does not fall under ss. 81, 83 and 85 of the Act – Applications dismissed

BLUE MAN TORONTO, LLC ; RE CANADIAN ACTORS' EQUITY ASSOCIATION; KEN BURNS AND SUSAN WALLACE ..... (Jan./Feb.) 4

Judicial Review – Certification – Practice and Procedure – Reconsideration – The Board certified the union pursuant to s. 128.1 after the City failed to file its response within the time stipulated by the Act and the Board's Rules – The City applied for reconsideration of the Board's decision on the main ground that the union improperly delivered its application to the wrong facsimile number – The union alleged that it received the facsimile number from the assistant to the City's Supervisor – The Board found that an organization bears the risks that comes with how it receives or handles faxes in the ordinary course of business, however if the City disputed the assertion that the union received the facsimile number from the Supervisor's assistant, it must make submissions on this to the Board – The Board dismissed the request for reconsideration, subject to receiving information from the City with respect to the assistant [Editor's note: no additional submissions were made by the City] On a motion by the union to strike all or parts of an affidavit sworn in support of the judicial review application, the court noted that there are rare and exceptional cases for the admission of an affidavit on an application for judicial review in circumstances where the content of the affidavit was not before the Board – In these circumstances however, the court concluded that the City was

correct in its assertion that its affidavit properly provided evidence that may establish the Board's denial of natural justice to the City, and given the precedent for the admission of affidavit evidence to show denial of natural justice, the court found the City was entitled to establish its case through this evidence – Motion to strike dismissed [Editor's note: Motion to Appeal has been filed]

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD ..... (Sept./Oct.) 755

Judicial Review – Constitutional Law – Interim Relief – Intervenor –Reference – Unfair Labour Practice – The Board considered whether certain provisions of the *Labour Relations Act, 1995* are of no force and effect by reason of either the enactment of a First Nation *Labour Code*, aboriginal or treaty rights, or the First Nation's inherent right to self-government – The Board addressed the concept of aboriginal rights and considered the test to be applied in determining whether a right has been established – Citing *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – Constitutional question answered in the negative – Employer is obliged to bargain and the Minister may appoint a conciliator – On judicial review, the Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the First Nation had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the court held that the Board had the statutory authority to conduct the proceedings as it did – Application for judicial review dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB ..... (May/June) 450

Judicial Review – Construction Industry – Public Sector Labour Relations Transition Act – Related Employer – Sale of Business – Stay –The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – Subsequent to its related employer decision the Board scheduled a grievance, alleging a failure to comply with the provincial agreement, involving some of the parties, which had been adjourned pending the related employer application – The School Board brought an application for a stay to Divisional Court pending the hearing of its judicial review application on the finding of relatedness – The Court dismissed the motion noting that the parties had secured an early date for the judicial review application, and while commenting that there "may be some benefit gained by the parties" if the grievance was adjourned pending the outcome of the judicial review application, the Court left that issue to be determined by the Board, given the slow pace with which the litigation had been advanced – Motion for stay dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773 et al.....(May/June) 473

Judicial Review – Duty of Fair Representation – The applicant sought judicial review of a decision of the Board and its subsequent reconsideration – The issue before the Court was whether the Board erred in denying the Applicant's claim that UFCW, Local 1000A breached its duty of fair representation pursuant to s. 74 of the Act – The Applicant's complaint arose from mid-term amendments to the collective agreement negotiated by Loblaws Local 1000A that were unanimously ratified by a group of primarily elected division officers – The Union then agreed to the amendments which were opposed by the Applicant on a number of grounds, including that the Union did not properly consult its membership or hold a ratification vote of the mid-term amendments pursuant to s. 44 of the Act – The Court held that the Board was not patently unreasonable in reaching its conclusion in both its decision and reconsideration – The Court stated that the Board properly pointed out that the Union members, including the Applicant, could express their views when the Collective Agreement comes up for renewal – The Court concluded that the Union acted reasonably and fairly in negotiating the mid-term amendments to the Collective Agreement, given the competition faced by Loblaws and the business climate of the day – Application dismissed

BENJAMIN BLASDELL; RE ONTARIO LABOUR RELATIONS BOARD; UNITED FOOD AND COMMERCIAL UNION A.F.L-C.I.O-C.L.C., LOCAL 1000A; LOBLAW'S SUPERMARKETS LIMITED .....(Jan./Feb.) 113

Judicial Review – Duty of Fair Representation – The Board had dismissed four duty of fair representation complaints by the applicant against his union – The court found that the standard of review was patent unreasonableness and that the Board's decisions not only met that test, but were all correct – Application dismissed

GRANTLEY, HOWELL ; RE UNITED STEELWORKERS OF AMERICA, LOCAL 7135; OLRB .....(Mar./Apr.) 304

Judicial Review – Duty of Fair Representation – The Court held that a dismissal of a duty of fair representation complaint for delay was subject to a standard of patent unreasonableness – The Board's unpublished rule of thumb regarding delay was presumptive only, and the Board gave consideration to applicable criteria – There was nothing clearly irrational or so flawed in the Board's ruling to cause the Court to interfere with the decision – Application dismissed – Leave to appeal to Court of Appeal dismissed – Leave to appeal to Supreme Court of Canada dismissed

JAMAL, NASEEM ; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION AND THE OLRB .....(May/June) 474

Judicial Review – Employment Standards – The applicant employer sought judicial review of the Board's decision upholding the employment standards officer's finding that the employee was entitled to severance pay – The standard of review of a decision of the Board interpreting the *Employment Standards Act, 2000* is reasonableness – The Court held that it was reasonable for the Board to find that six months' notice of termination and a 25% stay bonus did not satisfy the severance pay obligation under the *Act* – There was no greater right or benefit in the employer's payment arrangements with the employee: the severance payment obligation is distinct from the obligation to give notice of termination under the *Act* – The Court also held that the Board was reasonable in finding that an offer to relocate from Toronto to Kingston, even with relocation expenses

provided, was not an offer of reasonable alternative employment as contemplated by section 9(1)4 of Regulation 288/01 – Application for judicial review dismissed

ASSURANT GROUP; RE: IGNACIA MENOR FILLION; DIRECTOR OF EMPLOYMENT STANDARDS ; ONTARIO LABOUR RELATIONS BOARD .....(Jan./Feb.) 110

Judicial Review – Health and Safety – Reprisal – The employee sought redress for discipline instituted against him arising out of two separate incidents in the workplace – The Board found there was no anti-safety animus on the earlier event, and the applicant had no objective grounds for engaging in a work refusal in the second occurrence – On judicial review the Court held the Board's findings were not irrational and no reviewable error was made – Application dismissed; Board decision not reported.

ROOKE, JOSEPH ; RE STELCO HAMILTON AND THE OLRB AND THE MINISTRY OF THE ATTORNEY GENERAL FOR ONTARIO ..... (July/Aug.) 645

Judicial Review – Related Employer – Sale of Business – On judicial review the court found that the standard was patent unreasonableness, that there was evidence to support the Board's finding that Courtney Wheeler was a key man, that the Board was entitled to draw the conclusions that it did from the evidence, and that it made no error with respect to the application of s. 126(5)2 – Application for judicial review dismissed

C.M.G. INNOVATIONS CO. LTD.; RE OLRB; RE ONTARIO PIPE TRADES COUNCIL, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES OF AMERICA AND CANADA, LOCAL 819, CORNWALL & DISTRICT CONTRACTING LTD.; RE CITY & DISTRICT STEEPLEJACKS LIMITED, AND CHRISTIAN LABOUR ASSOCIATION OF CANADA, LOCAL 52 .....(Nov./Dec.) 853

Jurisdictional Dispute – A jurisdictional dispute arose between COPE and the CSU over the assignment of "Network Administrator" work to an employee of CUPE – CUPE argued that the Network Administrator duties fell within the job descriptions for Clerk-Typist and Secretary under the heading "other duties as assigned" – COPE submitted that the employee in question should be reclassified as either a Technology Analyst or a Technical Assistant, both of which fell within the COPE bargaining unit – CSU and ATSU, as an intervenor on behalf of CSU, argued that the Network Administrator duties fell outside the COPE bargaining unit – Moreover, CUPE, CSU and ATSU were parties to an agreement in which work that falls within the ATSU bargaining unit at the National Office of CUPE will fall within the CSU bargaining unit if performed outside the National Office - COPE argued that no reliance should be placed on this agreement as they were not a party to it and that the jurisdictional dispute was only between itself, CSU and CUPE – The Board rejected COPE's argument, holding that reference must be made to the overall collective bargaining relationships – The Board relied on the factors of economy and efficiency, employer past practice and employer preference in declining to change the assignment of work – Work assignment confirmed

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES LOCAL 491; RE CUPE AND CANADIAN STAFF UNION; RE ADMINISTRATIVE AND TECHNICAL
STAFF UNION (ATSU).....(Mar./Apr.) 134

Jurisdictional Dispute – Construction Industry – Sector Determination – Two sector determination applications were heard together to determine whether two construction projects came within the ICI or the electrical power systems sector (EPS) – The Board considered the meaning and scope of the EPS sector classification – The two construction projects were private sector initiatives aimed at assembling, erecting and installing sixty-six wind turbine electric generators with various affiliated transmission lines, transformers and substations – In examining whether or not the scope of the EPS sector should be restricted to projects taking place on what was once Ontario Hydro property, the Board reviewed the historical reasons for the creation of different construction industry sectors under the *LRA* – While the Board acknowledged that the 1978 Ellis Report indicated the primary focus of the EPS sector was traditionally on public sector power generation projects, the Board found the scope of the EPS sector was broad enough to include privately owned and developed construction projects and went beyond construction work done on what was once the property of Ontario Hydro – After determining that the scope of the EPS sector may include privately owned and operated construction projects, the Board considered which sector was more appropriate for the projects – Both the 'end use' of a construction industry project and the collective bargaining patterns of contractors were found to be relevant – As private power generation initiatives were a relatively new phenomenon, the Board recognized bargaining patterns for these kinds of projects had not yet had sufficient time to develop and emerge – As a result greater reliance was placed on the two projects' end use – While the applicant argued the projects' end use had a commercial aspect suggesting an ICI sector classification, the Board found the projects' end use to be predominantly aimed at the generation and transmission of power – Consequently, the two projects were deemedto fall within the EPS sector

LEO ALARIE AND SONS LIMITED; BLACK AND MCDONALD LIMITED; RE LIUNA AND LIUNA ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, LOCAL 446; RE IUOE LOCAL 793; RE CANADIAN UNION OF SKILLED WORKERS; RE UNIVERSAL WORKERS' UNION, LOCAL 183; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 736; RE IBEW; RE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND ITS LOCAL 1592; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION ..... (Sept./Oct.) 721

Last Offer Vote – Reference – The Minister of Labour asked the Board to determine whether he had the authority to order a last offer vote, given that the parties had agreed in their collective agreement that at an impasse in negotiations there would be no strike or lock-out and any matters in dispute would be settled by arbitration – Following negotiations which the Board termed "bitter, even toxic" and the issuance of a "no-board" report, the employer asked the Minister to hold the last offer vote – Over the union's objection, the vote was held, the box sealed, and the question referred to the Board; in addition, a Selector (arbitrator) had been agreed to by the parties and a hearing date had been set – The Board considered the policy rationale for last offer votes and focused on the opening words of s. 42 of the Act ("Before or after the commencement of a strike or lock-out…") Relying on earlier case law where disputing parties had no right to strike or lock-out, the Board found in the instant case that since the parties had agreed to no strike/no lock-out, they had foreclosed the operation of s. 42 because a strike or lock-out could never occur – The Minister did not have the authority to direct a last offer vote

CANADIAN NIAGARA HOTELS INC.; RE UNITE HERE LOCAL 75 ..... (July/Aug.) 493

Lock-Out – Change in Working Conditions – Interference with Trade Unions – Unfair Labour Practice – An application was filed by the union pursuant to section 96, alleging that the responding party had violated sections 70, 72, 73, 76, 83, and 86 of the Act – The collective agreement between the two parties expired on August 31, 2005, and they were in a strike/lock-out position on December 5, 2005 – The responding party did not lock-out its employees – Rather, commencing December 5, it began to pay them in accordance with the new terms and conditions of employment that the responding party had unilaterally implemented – The applicant argued that the employer could not impose terms and conditions of employment until after it had locked-out its employees, and that any implementation of terms and conditions of employment prior to a lock-out constituted direct bargaining with employees contrary to section 73 – The responding party relied on section 86, which in its view gave it the right to change the terms and conditions of employment on the date at which the lock-out period commenced, even if no lock-out actually occurred – The Board agreed with the responding party, holding that once the parties are in a strike or lock-out position, section 86 does not prevent an employer from altering the terms and conditions of employment without the union's consent – Since the responding party altered the terms and conditions of employment only after the lock-out period had commenced, it did not violate section 86 – The Board also held there was no breach of section 73, finding that "altering" working conditions is not the same as "bargaining" directly with bargaining unit employees – The facts also did not disclose a breach of sections 70, 72, or 76 – As for section 83, since the parties were in a strike/lock-out position, there could be no violation – Application dismissed

NEENAH PAPER COMPANY OF CANADA; RE UNITED STEELWORKERS 1-2693 ..... (Mar./Apr.) 224

Lock-Out – Strike – Reconsideration – The ATU alleged the TTC had illegally locked out its employees, and also sought reconsideration of the earlier cease and desist order (the Whitaker decision) – The Board held that no lock-out was taking place, and stated that the parties could have had their differences considered through the grievance and arbitration process – The Board also found that the illegal strike was continuing – The Board stated that even if it were to find that the union had not received notice of the earlier hearing, it was not appropriate to vary the Board's order – The union had full opportunity to make the submissions it would have been able to make earlier - Lock-out application dismissed; reconsideration of strike application denied

TORONTO TRANSIT COMMISSION ; RE AMALGAMATED TRANSIT UNION, LOCAL 113, MIKE SMITH et al ..... (May/June) 438

Membership Evidence – Bargaining Unit – Certification – Construction Industry –Timeliness – After the two-day time limit under 128.1(3) had lapsed City Core filed a revised list that included three additional names – The union challenged the inclusion of two of these individuals, arguing City Core was statutorily prohibited from adding names after the two day time limit under 128.1(3) had lapsed – In regard to the third employee, the union did not challenge this employee's inclusion on the list as both sides had agreed he was to be included during a subsequent Regional Certification meeting – The Board found that City Core was prohibited from adding names to its list of employees after the expiry of the two day statutory period – The Board, however, permitted the inclusion of the third employee as neither party had challenged City Core's addition of this employee's name during the Regional Certification meeting and the Union would have been permitted to add the third employee to the list if City Core had not already done so – Matter continues

CITY CORE MECHANICAL LTD.; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 46 ..... (Sept./Oct.) 673

Membership Evidence – Certification – Construction Industry – Employee – Practice and Procedure – Reconsideration – The employer requested reconsideration of the Board's decision to certify the union under s. 128.1 based on membership evidence filed by the union on behalf of more than 55% of the employees in the bargaining unit – The employer filed affidavit evidence, in which each affiant stated they had not signed a union membership card, from three of its five employees who were on the list of employees the Board considered when it made its certification determination – The allegations were specific, detailed and quite serious as they raised an issue of fraud or misrepresentation – The Board noted that at least one of the three affiants appeared to have signed a union membership card, however the Board did not disclose the degree of overlap between the membership evidence and the three affiants nor did it disclose the identity of the person or persons who appeared to have signed a card – The Board set the request for reconsideration down for hearing – Matter continues

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Nov./Dec.) 804

Membership Evidence - Certification – Construction Industry – Employee – Status – The responding party filed a timely response in this application for certification – The employer's primary position was that it had no employees in the bargaining unit because it was not the employer of the persons the applicant had sought to represent; it filed no names on its "Schedule A" – In the alternative, the responding party asserted there were seven more individuals than the four identified in the applicant's materials doing the same work on the application date; at the hearing the responding party sought to add the seven individuals to its "Schedule A" – The Board held that a responding party seeking to assert it is an employer of more individuals than the applicant has proposed must, pursuant to s. 128.1(3), provide the names of those individuals in a timely way, even if its submission relating to those individuals is an alternative position – Employer's motion to file the list of names after the two-day period set out in 128.1(3) dismissed – Matter continues

DESI'S ALUMINIUM CAMBRIDGE; RE CARPENTERS' UNION, CENTRAL ONTARIO REGIONAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA. ..... (Sept./Oct.) 700

Membership Evidence – Certification – Construction Industry – Practice and Procedure – The Board decided after examining the membership evidence that the dates on which the cards were signed should be disclosed for the following reasons: the information was arguably relevant; the pattern of dates on the cards was not likely to distort any party's presentation of its case; and, given that the Board might draw some conclusions from having looked at the dates, natural justice required that the parties be entitled to the information in order to make submissions – Finally, the Board refused to disclose the total number of cards in the application, since such disclosure would open the door to changes of position based on the perception of the likely strength of the union rather than a desire to identify which employees are actually in the appropriate bargaining unit

PRE ENG CONTRACTING; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA ..... (May/June) 407

Membership Evidence – Certification – Fraud – In this displacement application for certification, the incumbent (CHCW) alleged that the applicant (SEIU), in gathering and submitting membership evidence, had engaged in conduct that amounted to fraud – The Board held that a challenge to membership evidence can only be considered in the context of s. 64 of the Act – The allegations were: (a) an SEIU organizer told employees union membership was a condition of employment; (b) some membership applications were received by mail but bore "witness" signatures; (c) the Board's Form A-4 did not disclose that certain cards were mailed in, nor did the declarant or his collectors make the appropriate inquiries of the signatories; and (d) some employees sought the return of their SEIU memberships but the union refused – The Board reiterated its longstanding distinction between a party's misrepresentations to employees and those made to the Board – Only the latter constitute fraud on the Board and only in circumstances where the misrepresentations were false and the Board relied on them – Allegations (a), (b) and (d) did not amount to fraud on the Board. Nor did the omission regarding mailed-in cards – With respect to the failure to make appropriate inquiries and CHCW's evidence of three individuals who asserted they had not been asked about their membership cards, the Board held that this was insufficient evidence to deny the holding of a representation vote and in any event the vote was an expression of the true wishes of the employees – Furthermore, there were no allegations that any of the cards had not been signed by the actual employees – Certificate issued

OAKWOOD RETIREMENT COMMUNITIES INC.; RE SEIU LOCAL 1.ON; RE CANADIAN HEALTH CARE WORKERS (CHCW).....(Mar./Apr.) 262

Membership Evidence – Certification – Practice and Procedure – After a certification vote where sixteen of eighteen ballots were cast in favour of the union, the employer repeated in its post vote submissions the allegations in its response: namely that two union organizers had come to the employer's office and stolen a contact list of current employees, which had been used for the purpose of contacting the employees during the organizing drive – The employer asked the Board to dismiss the application pursuant to its discretionary powers contained in section 23(1) of the *Statutory Powers and Procedure Act* arguing that the union's actions amounted to an abuse of process since the application for certification was the 'poisoned fruit' of the illegally obtained list – The Board noted that section 8(9) of the Act precluded the Board from having regard to allegations of this nature when disposing of an application for certification – The Board noted there was no allegation that the union's membership evidence was either false or misleading, nor were there any allegations that misrepresentations had been made to any employees – While the Board recognized that the union's alleged actions may have compromised the trust between the union and employer, employees' access to trade unions and collective bargaining are central purposes of the Act – The Board found there was no basis upon which to decline to grant the application for certification – Certification granted

CARE2000 HEALTH SERVICES ; RE SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 .....(Nov./Dec.) 785

Occupational Health and Safety Act – Work Refusal – OPSEU appealed an Inspector's decision not to make an Order requiring the Ministry of Transportation (MTO) to provide OC (pepper) spray to its Transportation Enforcement Officers (TEOs), arguing this was contrary to section 25(2)(h) of the *OHSA* – The Union also appealed the Inspector's decision not to treat a work stoppage as a work refusal under section 43 of the *OHSA* – The Board held that under section 25(2)(h), it is not every precaution which must be

taken by an employer, but only reasonable precautions – Determining what is reasonable involves balancing the benefit to be gained by taking the precaution against all other relevant factors, including the cost of the precaution and its effect on efficiency – The Board established that the magnitude and the frequency of the risk of assault were relevant considerations in determining whether the provision of OC spray was necessary – The circumstances under which OC spray could be used were exceedingly rare – Further, deploying OC spray contradicted the MTO disengagement policy – Accordingly, the Board concluded that the issuance of OC spray was outside the range of reasonable precautions that the employer was required to take – The Board exercised its discretion not to make any decision with respect to the work refusal – Five years had passed between the work refusals and the conclusion of the hearing – Given that the work refusals were primarily about whether OC spray should be provided, and the merits of the TEOs' complaints were dealt with by the inspectors in a relatively short period of time, there was little benefit to be gained by deciding the work refusal issue so long after the fact – Appeal dismissed

THE CROWN IN RIGHT OF ONTARIO (MINISTRY OF TRANSPORTATION), MINISTRY OF LABOUR; RE ONTARIO PUBLIC SERVICE EMPLOYEES' UNION ..... (Mar./Apr.) 196

Practice and Procedure – Adjournment – Certification – Construction Industry – Related Employer – Sale of a Business – Unfair Labour Practice – The responding parties sought an adjournment of these proceedings because of a pending criminal trial involving the employer's representative and an employee – The responding parties argued that because of an Undertaking Given to a Peace Officer, the employer's representative was prohibited from "going to anyplace" the employee was to be (he was a potential witness in these proceedings) – Once the Board established that the employee was not in attendance, it ordered the employer's representative to appear at the hearing – The Board refused to adjourn its proceedings: first, there was no consent to the request; second, the Board gives priority to serious allegations of unfair labour practices; third, the personal concerns of the employer's representative do not attract the same level of concern as do the interests of the parties; fourth, the Board is not in a position to remedy conflicts of loyalties a person may have (between self-interest and the interests of the employer) – Matters referred to Registrar to set hearing dates

NORTHL AND PROPERTIES CORPORATION ; VANDALAY CONTRACTING INC.; RE LIUNA LOCAL 506..... (Mar./Apr.) 245

Practice and Procedure – Alteration of Jurisdiction – Construction Industry – Damages – Interim Relief – Trade Union – Unfair Labour Practice – The Local complained that the International, without just cause and contrary to sections 147 and 149, altered the jurisdiction of the Local and placed it under supervision – The Local also complained that the International represented it in a manner that was arbitrary, discriminatory, or in bad faith – The Board determined that the matter required an expeditious resolution and that this could only be achieved through a consultation – In 2002, as the International restructured into Regional Councils, the Local voluntarily affiliated with GORC (which did not permit Locals to employ persons directly) and remained bound by the International's constitution – In 2005 a dispute arose between the Local and International when three Local officers either resigned or were dismissed from employment with GORC – The Local resolved to withdraw from GORC and remain autonomous; the International responded with an audit, a hearing and the placement of the Local under supervision – The Board first found that there was no alteration of jurisdiction by the International: the International in attempting to keep the Local in the GORC, was doing

nothing other than giving effect to the jurisdiction voluntarily assumed by the Local – The Board next considered the four factors set out in s. 147(3) for determining whether the International had cause and found in favour of the International having had cause – Further the Board found the International had just cause to assume supervision of the Local – The Local had no legitimate justification for its secession from the International at the outset and the interests of the Local, as distinct from the interests of the individuals, were not impaired or put in jeopardy by the supervision or the process leading to the supervision – Applications dismissed, subject to the issue of whether damages were payable

GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL & ALLIED WORKERS; RE CJA, LOCAL UNION 93 .....(Jan./Feb.) 52

Practice and Procedure – Bargaining Rights – Construction Industry – Evidence – Termination – When the IBEW objected to the evidence of employee wishes supplied by the applicant and the Board determined that only photocopies had been filed with the application, the applicant was able to produce the original document to overcome the objection since there were no other defects in the application materials – The Board held that one copy of the employees' wishes was adequate for multiple applications: it is not necessary for employees signing an expression of their wishes to stipulate the Board Area or sector of the construction industry in which they are working in order to make clear that they do not want to be represented any longer by their bargaining agent – The wording of the document providing evidence of the employees' wishes must be sufficient to show the intention – Matter continues

JLY ELECTRIC LTD.; RE ERNIE PICKARD; IBEW, LOCAL 105; IBEW CONSTRUCTION COUNCIL OF ONTARIO.....(Sept./Oct.) 710

Practice and Procedure – Certification – Charter of Rights and Freedoms – Representation Vote – Standing – In this application for certification, the employer sought a declaration that the representation vote was void, that a new vote should be ordered, and that the Board either translate the ballots into Chinese and Punjabi, and/or allow the presence and use of an interpreter to assist the voters at the vote – Issues addressed were: does the employer have standing to raise arguments relating to the Charter in this case; did the Board violate sections 2(d) and/or 14 and/or 15(1) of the Charter in refusing to allow translated ballots or the presence of interpreters at the vote; if the Board did violate sections 2(d) or 14 or 15 of the Charter is it justified under section 1 of the Charter; did the Board violate section 5 and 6 of the Ontario Human Rights Code in refusing to allow translated ballots and the presence of translators at the vote – The Board saw no reason to allow standing in a situation of a long established practice where no employee raises the issue despite numerous notices posted – The Board also considered the other issues and was not persuaded that the vote, as carried out, had breached either the Charter or the Code – The Board held that the certification process and representation vote procedures are not protected activities under s. 2(d) – The Board held s.14 to only be available to parties or witnesses, and since the individual employees, on whose behalf relief was sought, were neither parties to this application nor witnesses, the section did not apply – The Board adopted the reasoning from R-Theta Inc. and found no breach of s.15 – Certificate issued

MAPLE LEAF CONSUMER FOODS INC.; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS).....(July/Aug.) 558

Practice and Procedure – Certification – Construction Industry – Reconsideration – Broccolini Construction asked the Board to reconsider its decision to certify a unit of carpenters and carpenter's apprentices – Broccolini did not file a response to the application for certification when it first received the application, mistakenly believing the certification application only applied to a subcontractor under its employ – Broccolini did not forward the certification application materials to the subcontractor – Following the issuing of the certificate, Broccolini filed a reconsideration application and sought to litigate the issue before the Board, alleging it was not the employer of the employees on the certificate – The Board found there was a heavier burden of persuasion on a party seeking reconsideration where a certificate has been issued and questioned why Broccolini had made no effort whatsoever to respond to the initial certification application – Consequently, the Board declined to reconsider its decision to certify the union

BROCCOLINI CONSTRUCTION (ONTARIO) INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 ..... (Sept./Oct.) 667

Practice and Procedure – Certification – Construction Industry – Employee – Membership Evidence – Reconsideration – The employer requested reconsideration of the Board's decision to certify the union under s. 128.1 based on membership evidence filed by the union on behalf of more than 55% of the employees in the bargaining unit – The employer filed affidavit evidence, in which each affiant stated they had not signed a union membership card, from three of its five employees who were on the list of employees the Board considered when it made its certification determination – The allegations were specific, detailed and quite serious as they raised an issue of fraud or misrepresentation – The Board noted that at least one of the three affiants appeared to have signed a union membership card, however the Board did not disclose the degree of overlap between the membership evidence and the three affiants nor did it disclose the identity of the person or persons who appeared to have signed a card – The Board set the request for reconsideration down for hearing – Matter continues

LES BURCH & SON CONTRACTING; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Nov./Dec.) 804

Practice and Procedure – Certification – Construction Industry – Reconsideration – Having failed to file a response or the information required under s. 128.1(3) within the time stipulated, the employer asked the Board to reconsider its decision certifying the applicant on the basis that the applicant did not deliver a copy of the application to the employer – Although a successful facsimile transmission report was entered by the union, the employer argued that the 58 page transmission never came to the attention of the employer – The Board found that in the absence of any record from the employer's facsimile machine to suggest that no transmission was received, the evidence established that the application was received – The risk falls on the employer to keep adequate track of facsimiles received – Therefore the Board found the delivery effective – Request for reconsideration dismissed

GLASBAU HAHN GMBH + CO. KG; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, CJA ..... (Mar./Apr.) 154

Practice and Procedure – Certification – Construction Industry – Membership Evidence – The Board decided after examining the membership evidence that the dates on which the cards were signed should be disclosed for the following reasons: the information was arguably relevant; the pattern of dates on the cards was not likely to distort any party's

presentation of its case; and, given that the Board might draw some conclusions from having looked at the dates, natural justice required that the parties be entitled to the information in order to make submissions – Finally, the Board refused to disclose the total number of cards in the application, since such disclosure would open the door to changes of position based on the perception of the likely strength of the union rather than a desire to identify which employees are actually in the appropriate bargaining unit

PRE ENG CONTRACTING; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA ..... (May/June) 407

Practice and Procedure – Certification – Construction Industry – Reconsideration – PRW requested reconsideration of the Board's decision certifying the applicant on the basis of only the information provided by the applicant, as PRW had failed to file its response in a timely manner as required by s. 128.1(3) – Since PRW's allegations, if true, meant there would be only one employee in the bargaining unit, it argued that the applicant's information "misrepresented" the bargaining unit and the Board should exercise its discretion to consider the information under s. 128.1(5) – The Board found that misrepresentation must include some additional element or aspect that could not have been addressed by the provision of information in the normal course by the employer under s. 128.1(3), otherwise common construction industry status disputes could be characterized as misrepresentations – Additionally the Board noted that PRW had not alleged any wrongdoing by the applicant through the statements filed – Request for reconsideration dismissed

PRW EXCAVATING CONTRACTORS LTD. ; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Mar/Apr. 274

Practice and Procedure – Certification – Construction Industry – Reconsideration – Status – During the hearing of status disputes in this application for certification, the applicant sought to admit a cleaning contract that would indicate one of the witnesses was cleaning a certain residence at the time of certification – The witness had already concluded her testimony and had claimed she did not clean the residence in question – The respondent objected to the admissibility of the contract on the basis of the rule in *Browne v. Dunn* and the Board sustained the objection – At the next hearing date, the applicant sought reconsideration of the procedural ruling – The Board considered the rule's proper application in the certification context: at no time had the applicant introduced the evidence during cross-examination of the witness; the document was not relevant to any issue other than impeaching the witness' testimony; the contract went to the essential issue of whether the witness was performing bargaining unit work on the date of application – Finding the rule applied, the Board held that serious prejudice would be caused by allowing the contract to be entered into evidence: the applicant would be allowed to split its case and the already two-year-old application would be further lengthened, thereby compromising the efficiency of the Board's certification process – In contrast, the prejudice suffered by the applicant was minimal – Although not determinative of the matter, the Board also noted that the applicant had failed to follow Rule 8.3 of the Board's Rules of Procedure – Having regard to the purpose of the Act and labour relations principles, the Board confirmed its original ruling that the evidence was inadmissible – Reconsideration denied; matter continues

JOHN BODDY DEVELOPMENTS LTD.; RE LIUNA LOCAL 183 ..... (May/June) 360

Practice and Procedure – Certification – Construction Industry – Reconsideration – The Board

was asked to reconsider its certification of the applicant by employees who did not receive notice of the certification application from either the employer or the union – Even on the employees' best case the Board would still have certified the applicant – Therefore, the failure to provide the notice to employees would not have affected the Board's decision – Reconsideration request dismissed

CARLETON IRON WORKS CO. LIMITED; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 765 .....(Jan./Feb.) 15

Practice and Procedure – Certification – Construction Industry – The applicant filed its application for certification by Priority Courier on a Saturday, including a signed but incomplete Declaration Verifying Membership Evidence (Form A-74) – The applicant corrected its error by filing a completed Form on Monday – The Board found that both the application and the Form arrived at the Board on the same day, although they were filed on different days – There was no prejudice to the responding party, so the Board exercised its discretion to relieve against the technical violation of Rule 25.1 (duty to file all documents with the application) – Certification granted

BALKO DRYWALL INC; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 .....(Mar./Apr.) 130

Practice and Procedure – Certification – Construction Industry – Unfair Labour Practice –In response to the union's application for certification, accompanied by a request for relief under section 11, the employer provided a materially significant 8.1 notice – The union asked that no representation vote be held (notwithstanding a finding of not less than forty percent of the individuals in the bargaining unit proposed in the application) until its s. 11 relief was determined, however the Board found that s. 8(2) requires that a representation vote be taken – Finally, although the employer consented to the counting of the ballots, given that the union had sought a delay in the representation vote, the Board was uncertain whether the union consented to the ballots being counted and ordered the ballot box sealed until the Board so orders or the parties agree – Matter continues

EAST ELGIN CONCRETE FORMING LIMITED ; RE LIUNA LOCAL 1059. .....(Sept./Oct.) 706

Practice and Procedure – Certification – Judicial Review – Reconsideration – The Board certified the union pursuant to s. 128.1 after the City failed to file its response within the time stipulated by the Act and the Board's Rules – The City applied for reconsideration of the Board's decision on the main ground that the union improperly delivered its application to the wrong facsimile number – The union alleged that it received the facsimile number from the assistant to the City's Supervisor – The Board found that an organization bears the risks that comes with how it receives or handles faxes in the ordinary course of business, however if the City disputed the assertion that the union received the facsimile number from the Supervisor's assistant, it must make submissions on this to the Board – The Board dismissed the request for reconsideration, subject to receiving information from the City with respect to the assistant [Editor's note: no additional submissions were made by the City] On a motion by the union to strike all or parts of an affidavit sworn in support of the judicial review application, the court noted that there are rare and exceptional cases for the admission of an affidavit on an application for judicial review in circumstances where the content of the affidavit was not before the Board – In these circumstances however, the court concluded that the City was correct in its assertion that its affidavit properly provided evidence that may establish the

Board's denial of natural justice to the City, and given the precedent for the admission of affidavit evidence to show denial of natural justice, the court found the City was entitled to establish its case through this evidence – Motion to strike dismissed [Editor's note: Motion to Appeal has been filed]

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD ..... (Sept./Oct.) 755

Practice and Procedure – Certification – Membership Evidence – After a certification vote where sixteen of eighteen ballots were cast in favour of the union, the employer repeated in its post vote submissions the allegations in its response: namely that two union organizers had come to the employer's office and stolen a contact list of current employees, which had been used for the purpose of contacting the employees during the organizing drive – The employer asked the Board to dismiss the application pursuant to its discretionary powers contained in section 23(1) of the *Statutory Powers and Procedure Act* arguing that the union's actions amounted to an abuse of process since the application for certification was the 'poisoned fruit' of the illegally obtained list – The Board noted that section 8(9) of the Act precluded the Board from having regard to allegations of this nature when disposing of an application for certification – The Board noted there was no allegation that the union's membership evidence was either false or misleading, nor were there any allegations that misrepresentations had been made to any employees – While the Board recognized that the union's alleged actions may have compromised the trust between the union and employer, employees' access to trade unions and collective bargaining are central purposes of the Act – The Board found there was no basis upon which to decline to grant the application for certification – Certification granted

CARE2000 HEALTH SERVICES; RE SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1 ..... (Nov./Dec.) 785

Practice and Procedure – Certification – Status – In order to determine status disputes about whether certain employees were employed "in, at and out of" a certain address, the Board directed particularized "will say" statements and at the hearing into the matter asked additional questions to clarify some of the statements made – The Board found that where employees work at or out of more than one site, for the purposes of determining whether they fall within a bargaining unit encompassing only one of those sites the Board considers to which site the employee has the greatest attachment – While the employees at issue sometimes worked "out of" the specific address, they were not primarily attached to this address – Matter continues

RAINBOW CONCRETE INDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 ..... (May/June) 409

Practice and Procedure – Certification – Two timely displacement applications were filed with the Board on the same day – In the Teamsters' application, the employer disputed the union's estimate of the number of employees in the proposed bargaining unit, and gave notice under s. 8.1 – The Board was unable to determine whether the Teamsters had the requisite 40% membership – A three-way vote was ordered, with the box sealed pending the outcome of the s. 8.1 challenge – Vote ordered

WILLIAM NEILSON LIMITED; RE UFCW; CLAC ..... (Sept./Oct.) 754

Practice and Procedure – Certification – The union sought an out-of-province summons and a certificate in accordance with the *Interprovincial Summons Act* – The Board was satisfied that pursuant to that Act and the Board's own powers under clause (c) of subsection 111(2) of the *Labour Relations Act, 1995* it has the authority to enforce the attendance of a witness in the same manner as a civil court – The Board was not persuaded, however, that its power extended to the issuance of the certificate pursuant to s. 5 of the ISA – Matter continues

3469051 CANADA INC.; RE CARPENTERS UNION, CENTRAL ONTARIO REGIONAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA .....(Nov./Dec.) 759

Practice and Procedure – Construction Industry – Construction Industry Grievance – Damages – Reconsideration – The Board was asked to reconsider a default judgment and applied the four factors set out in *Weinmann Electric Ltd.* – The explanation for the default weighed against granting the request since the responding party's failure to respond was due to its own lack of diligence – The other three factors weighed in favour of the responding party: its reconsideration request was filed in a timely fashion; members of another trade union were performing the work in question thereby providing *prima facie* evidence that there existed a good defence on the merits; and the applicant could not claim prejudice given that it did not come to the Board with clean hands in that it failed to notify the other union of the application – Accordingly the Board granted the application and set aside the default judgment – Grievance continues

BLACK & MCDONALD LIMITED; RE IBEW, LOCAL 120 .....(Jan./Feb.) 1

Practice and Procedure – Construction Industry Grievance – Two days after filing a grievance, the applicant advised the Board that the parties had agreed to adjourn the scheduled hearing to a date some six weeks later – The applicant specifically stated it was not consenting to "otherwise extend any time limits provided in the Board's Rules" – Although the responding party failed to file a timely Request for Hearing and Notice of Intent to Defend (Form A-87), the contact between the parties suggested to the Board that the responding party had expressed interest in the matter – The Board declined to proceed to determine the matter (issue a default judgement) without giving the responding party a further opportunity to file a Form A-87 together with the requisite fee – Matter deferred

LASALLE BACKHOE SERVICES; RE LIUNA LOCAL 625 ..... (Mar./Apr.) 186

Practice and Procedure – Discharge – Construction Industry Grievance – The applicant grieved the discharge of two employees who were fired for allegedly smoking marijuana during their lunch break – The respondent sought to admit videotape surveillance it alleged depicted the grievors smoking marijuana in their truck located offsite of the employer's property – The applicant opposed the admission of the videotape on the basis that it violated the grievors' right to privacy and because the videotape was not produced in a timely manner – The Board considered two lines of arbitral authority on the admission of videotape surveillance: admission where the surveillance is relevant and admission where the surveillance is not conducted unreasonably or for an unreasonable purpose – The Board adopted the reasonableness test and found the surveillance was unreasonable for lack of sufficient motivation – A "feeling" that something is not right is no substitute for clear and reasonable grounds when employees are off duty and away from the worksite – The respondent had a less intrusive alternative to surveillance because it had an opportunity to observe the grievors' work performance but failed to observe such performance – Finally, there was a reasonable expectation of privacy because the

grievors were in their own vehicle – On the issue of delay of production, the Board held it was open to counsel to obtain a production order – Matter continues

THYSSENKRUPP ELEVATOR (CANADA) LIMITED; RE IUEC, LOCAL 50 ..... (May/June) 431

Practice and Procedure – Duty of Fair Representation – After dismissing two s. 74 complaints, the Board notes that the applicant has filed a number of applications at the Board and other tribunals, all of which relate to his disagreement with an arbitral decision dealing with the employer's duty to accommodate – The Board made a direction that the applicant may not bring another complaint against the union without leave of the Board – Applications dismissed

NEDELKOPOULOS, GUS; RE CAW-CANADA, LOCAL 222 .....(Jan./Feb.) 89

Practice and Procedure – Strike – The TTC brought an application for a declaration that its employees were about to engage in an illegal strike at the start-up of the morning shift – The Board provided notice to the union and counsel who normally acted for the union of a 5:30 a.m. hearing by conference call to deal with the application, leaving telephone messages and sending a facsimile to the union's office – The Board held that the union had been served with the application and had received notice of the hearing – The Board ordered the employees to cease and desist from any further engagement in the unlawful strike

TORONTO TRANSIT COMMISSION; RE AMALGAMATED TRANSIT UNION, LOCAL 113; RE MIKE SMITH et al ..... (May/June) 438

Practice and Procedure – Unfair Labour Practice – The union complained that the employer had committed an unfair labour practice by refusing to allow its business representative access to the members on company property – Following the representative's attendance at the workplace, the employer had issued a notice to the union under the *Trespass to Property Act* requiring that access be sought in writing, subject to prosecution – The employer argued that the issue of access was contractual in nature and should be deferred to arbitration – The union countered by stating that the employer's actions in invoking a criminal process had elevated the dispute beyond the collective agreement – The Board held that the employer's reaction to the representative's alleged breach of the collective agreement on the union's representation rights and obligations under the Act was properly within the Board's jurisdiction – Employer's objection denied – Matter proceeds to hearing

UNIVERSAL SHOWCASE/idX COMPANY; RE CJA, LOCAL 1072 .....(Jan./Feb.) 108

Prima Facie Case – Related Employer – Sale of Business – In order to build and operate a diamond mine, De Beers needed to construct an energy transmission line – Pursuant to the *Transmission Systems Code*, De Beers elected to build the line itself and upon completion would then be required to transfer ownership of the line to Hydro One – This process was established in a decision rendered by the Ontario Energy Board and was then implemented into the *Code* – Hydro One and De Beers brought two motions asking the Board to dismiss the Labourers' 69/1(4) applications without a hearing – The respondents sought to have the application dismissed as a collateral attack on the decision of the Ontario Energy Board and as disclosing no *prima facie* case – The Board determined that the application does not seek to attack or undermine the legal effect or order of the decision of the Ontario Energy Board, and is thus not a collateral attack – Although the

Ontario Energy Board decision establishes that companies have the freedom to choose who they want to construct transmission lines, the issue of collective agreements and restrictions on contracting were not addressed in the decision – The Board confirmed that the test for a *prima facie* case is high and discretion to dismiss a complaint on this basis should only be exercised in the clearest of cases – The Board dismissed the respondents' *prima facie* motion as the conveyance of the transmission line upon completion raises a sufficient case such that it cannot be said that the application stands no reasonable chance of success – Matter continues

DE BEERS CANADA INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; HYDRO ONE INC. (INCLUDING: HYDRO ONE N ETWORKS INC., HYDRO ONE NETWORKS SERVICES INC., HYDRO ONE REMOTE COMMUNITIES INC.).....(Nov./Dec.) 792

Public Sector Labour Relations Transition Act – Construction Industry – Judicial Review – Related Employer – Sale of Business – Stay – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – Subsequent to its related employer decision the Board scheduled a grievance, alleging a failure to comply with the provincial agreement, involving some of the parties, which had been adjourned pending the related employer application – The School Board brought an application for a stay to Divisional Court pending the hearing of its judicial review application on the finding of relatedness – The Court dismissed the motion noting that the parties had secured an early date for the judicial review application, and while commenting that there "may be some benefit gained by the parties" if the grievance was adjourned pending the outcome of the judicial review application, the Court left that issue to be determined by the Board, given the slow pace with which the litigation had been advanced – Motion for stay dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773 et al..... (May/June) 473

Reconsideration – Certification – Construction Industry – Employee – Membership Evidence – Practice and Procedure – The employer requested reconsideration of the Board's decision to certify the union under s. 128.1 based on membership evidence filed by the union on behalf of more than 55% of the employees in the bargaining unit – The employer filed affidavit evidence, in which each affiant stated they had not signed a union membership card, from three of its five employees who were on the list of employees the Board considered when it made its certification determination – The allegations were specific, detailed and quite serious as they raised an issue of fraud or misrepresentation – The Board noted that at least one of the three affiants appeared to have signed a union membership card, however the Board did not disclose the degree of overlap between the membership evidence and the three affiants nor did it disclose the identity of the person or persons who appeared to have signed a card – The Board set the request for reconsideration down for hearing – Matter continues

LES BURCH & SON CONTRACTING ; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL.....(Nov./Dec.) 804

Reconsideration – Certification – Construction Industry – Practice and Procedure –Broccolini Construction asked the Board to reconsider its decision to certify a unit of carpenters and

carpenter's apprentices – Broccolini did not file a response to the application for certification when it first received the application, mistakenly believing the certification application only applied to a subcontractor under its employ – Broccolini did not forward the certification application materials to the subcontractor – Following the issuing of the certificate, Broccolini filed a reconsideration application and sought to litigate the issue before the Board, alleging it was not the employer of the employees on the certificate – The Board found there was a heavier burden of persuasion on a party seeking reconsideration where a certificate has been issued and questioned why Broccolini had made no effort whatsoever to respond to the initial certification application – Consequently, the Board declined to reconsider its decision to certify the union

BROCCOLINI CONSTRUCTION (ONTARIO) INC.; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 93 ..... (Sept./Oct.) 667

Reconsideration – Certification – Construction Industry – Practice and Procedure – Having failed to file a response or the information required under s. 128.1(3) within the time stipulated, the employer asked the Board to reconsider its decision certifying the applicant on the basis that the applicant did not deliver a copy of the application to the employer – Although a successful facsimile transmission report was entered by the union, the employer argued that the 58 page transmission never came to the attention of the employer – The Board found that in the absence of any record from the employer's facsimile machine to suggest that no transmission was received, the evidence established that the application was received – The risk falls on the employer to keep adequate track of facsimiles received – Therefore the Board found the delivery effective – Request for reconsideration dismissed

GLASBAU HAHN GMBH + CO. KG; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, CJA ..... (Mar./Apr.) 154

Reconsideration – Certification – Construction Industry – Practice and Procedure – Status – During the hearing of status disputes in this application for certification, the applicant sought to admit a cleaning contract that would indicate one of the witnesses was cleaning a certain residence at the time of certification – The witness had already concluded her testimony and had claimed she did not clean the residence in question – The respondent objected to the admissibility of the contract on the basis of the rule in *Browne v. Dunn* and the Board sustained the objection – At the next hearing date, the applicant sought reconsideration of the procedural ruling – The Board considered the rule's proper application in the certification context: at no time had the applicant introduced the evidence during cross-examination of the witness; the document was not relevant to any issue other than impeaching the witness' testimony; the contract went to the essential issue of whether the witness was performing bargaining unit work on the date of application – Finding the rule applied, the Board held that serious prejudice would be caused by allowing the contract to be entered into evidence: the applicant would be allowed to split its case and the already two-year-old application would be further lengthened, thereby compromising the efficiency of the Board's certification process – In contrast, the prejudice suffered by the applicant was minimal – Although not determinative of the matter, the Board also noted that the applicant had failed to follow Rule 8.3 of the Board's Rules of Procedure – Having regard to the purpose of the Act and labour relations principles, the Board confirmed its original ruling that the evidence was inadmissible – Reconsideration denied; matter continues

JOHN BODDY DEVELOPMENTS LTD.; RE LIUNA LOCAL 183 ..... (May/June) 360

Reconsideration – Certification – Construction Industry – Practice and Procedure – The Board was asked to reconsider its certification of the applicant by employees who did not receive notice of the certification application from either the employer or the union – Even on the employees' best case the Board would still have certified the applicant – Therefore, the failure to provide the notice to employees would not have affected the Board's decision – Reconsideration request dismissed

CARLETON IRON WORKS CO. LIMITED; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 765 .....(Jan./Feb.) 15

Reconsideration – Certification – Judicial Review – Practice and Procedure – The Board certified the union pursuant to s. 128.1 after the City failed to file its response within the time stipulated by the Act and the Board's Rules – The City applied for reconsideration of the Board's decision on the main ground that the union improperly delivered its application to the wrong facsimile number – The union alleged that it received the facsimile number from the assistant to the City's Supervisor – The Board found that an organization bears the risks that comes with how it receives or handles faxes in the ordinary course of business, however if the City disputed the assertion that the union received the facsimile number from the Supervisor's assistant, it must make submissions on this to the Board – The Board dismissed the request for reconsideration, subject to receiving information from the City with respect to the assistant [Editor's note: no additional submissions were made by the City] On a motion by the union to strike all or parts of an affidavit sworn in support of the judicial review application, the court noted that there are rare and exceptional cases for the admission of an affidavit on an application for judicial review in circumstances where the content of the affidavit was not before the Board – In these circumstances however, the court concluded that the City was correct in its assertion that its affidavit properly provided evidence that may establish the Board's denial of natural justice to the City, and given the precedent for the admission of affidavit evidence to show denial of natural justice, the court found the City was entitled to establish its case through this evidence – Motion to strike dismissed [Editor's note: Motion to Appeal has been filed]

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND ONTARIO LABOUR RELATIONS BOARD .....(Sept./Oct.) 755

Reconsideration – Certification – Timeliness – Unfair Labour Practice – The union sought reconsideration of the decision dismissing the application for certification - Although the union indicated on the certification worksheet that it intended to file an unfair labour practice about the employer's conduct, the Board did not receive any representations in the five-day post-vote period provided for in its decision ordering the vote – The Union argued that it had difficulty obtaining timely statements from employees because of the employer's impugned conduct and it filed its s. 96 application as soon as it had gathered those statements (one week after the Board's decision dismissing the certification application) – The Board found that the union had sufficient knowledge of the allegations at the time of the vote or immediately thereafter to make appropriate representations – Request for reconsideration denied – Unfair labour practice complaint continues

THE CORPORATION OF THE COUNTY OF SIMCOE (GEORGIAN MANOR); RE SEIU LOCAL 1.on .....(Sept./Oct.) 751

Reconsideration – Construction Industry – Construction Industry Grievance – Damages – Practice and Procedure – The Board was asked to reconsider a default judgment and applied the four factors set out in *Weinmann Electric Ltd.* – The explanation for the default weighed against granting the request since the responding party's failure to respond was due to its own lack of diligence – The other three factors weighed in favour of the responding party: its reconsideration request was filed in a timely fashion; members of another trade union were performing the work in question thereby providing *prima facie* evidence that there existed a good defence on the merits; and the applicant could not claim prejudice given that it did not come to the Board with clean hands in that it failed to notify the other union of the application – Accordingly the Board granted the application and set aside the default judgment – Grievance continues

BLACK & MCDONALD LIMITED; RE IBEW, LOCAL 120 .....(Jan./Feb) 1

Reconsideration – Duty of Fair Representation – The union and employer sought reconsideration of a Board decision ordering that the applicant's grievance proceed to arbitration – Both the union and the employer stated they had not received notice of the consultation that gave rise to the decision – The parties submitted that the grievance had been taken to arbitration – The Board held that it was not necessary for it to determine whether or not the notice of consultation had been received by the union or the employer: if it was not, the Board's earlier decision would have to be set aside; if it was, the Board was satisfied that the union and employer had previously demonstrated an intention to participate in the proceeding; their failure to attend was inadvertent; the applicant cannot be prejudiced because his matter proceeded to arbitration – Reconsideration granted

MARK WILSON; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION & GENERAL WORKERS UNION OF CANADA (CAW-CANADA) & ITS LOCAL 222 ; RE A.G. SIMPSON AUTOMOTIVE SYSTEMS .....(Mar./Apr.) 302

Reconsideration – Health and Safety – Timeliness – The applicant sought reconsideration of the Board's decision dismissing its appeal for having filed it beyond the statutory 30-day time limit found in s. 61(1) of the *Occupational Health and Safety Act* – The applicant argued the Board has jurisdiction to "deviate, abridge and extend" the time period set out in the Act if the exercise of discretion relates to procedural requirements – The applicant sought to rely on s. 123 of the *Labour Relations Act, 1995* ("technical irregularity") and s. 4.5 of the *Statutory Powers Procedure Act* ("refusal to process documents") – The Board held that it could not import a provision of the LRA when the OHSA set out a complete code for appeals – Similarly, the Board held that s. 4.5 of the SPPA could not be relied on because the Board had in fact processed the appellant's documents and had dismissed the appeal for having been filed beyond the statutory time limit – Reconsideration denied

LAC DES ILES MINE LTD.; RE USWA; AND INSPECTOR ANDRES JOHANNESSON.....(Sept./Oct.) 715

Reconsideration – Health and Safety –Timeliness – The Board was asked to reconsider its decision dismissing an application appealing an inspector's decision not to make an Order, where the appeal was made beyond thirty days from the inspector's visit to the job site and his refusal to issue an Order, but within 30 days of having received a copy of the Premise/Project Form providing the information that no orders were issued – The Board found that the OHSA only requires a contravention order under s. 57 to be confirmed in writing and nothing requires an inspector to confirm in writing his or her refusal to issue an order – In the absence of a posting of an order the Board found the union reasonably

ought to have known that the inspector refused to issue an order – Further the fact that the inspector subsequently faxed the Premise/Project Form to the union did not give rise to a new period of time in which the union could file its appeal – The provision of the Premise/Project Form at a later date does not mean that the inspector's decision occurred at some later time, nor does it provide the union with a new 30-day time period – The time limit begins from the day of the refusal to issue an order – Request for reconsideration dismissed

LASER ELECTRIC AND DIRECT ENERGY AND WENDY GOBEIL, INSPECTOR; RE IBEW, LOCAL 586. ..... (July/Aug.) 551

Reconsideration – Lock-Out – Strike – The ATU alleged the TTC had illegally locked out its employees, and also sought reconsideration of the earlier cease and desist order (the Whitaker decision) – The Board held that no lock-out was taking place, and stated that the parties could have had their differences considered through the grievance and arbitration process – The Board also found that the illegal strike was continuing – The Board stated that even if it were to find that the union had not received notice of the earlier hearing, it was not appropriate to vary the Board's order – The union had full opportunity to make the submissions it would have been able to make earlier - Lock-out application dismissed; reconsideration of strike application denied

TORONTO TRANSIT COMMISSION ; RE AMALGAMATED TRANSIT UNION, LOCAL 113, MIKE SMITH et al ..... (May/June) 438

Reconsideration – Practice and Procedure – Certification – Construction Industry – PRW requested reconsideration of the Board's decision certifying the applicant on the basis of only the information provided by the applicant, as PRW had failed to file its response in a timely manner as required by s. 128.1(3) – Since PRW's allegations, if true, meant there would be only one employee in the bargaining unit, it argued that the applicant's information "misrepresented" the bargaining unit and the Board should exercise its discretion to consider the information under s. 128.1(5) – The Board found that misrepresentation must include some additional element or aspect that could not have been addressed by the provision of information in the normal course by the employer under s. 128.1(3), otherwise common construction industry status disputes could be characterized as misrepresentations – Additionally the Board noted that PRW had not alleged any wrongdoing by the applicant through the statements filed – Request for reconsideration dismissed

PRW EXCAVATING CONTRACTORS LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL ..... (Mar./Apr.) 274

Reference – Constitutional Law – Interim Relief – Intervenor – Judicial Review – Unfair Labour Practice – The Board considered whether certain provisions of the *Labour Relations Act, 1995* are of no force and effect by reason of either the enactment of a First Nation *Labour Code*, aboriginal or treaty rights, or the First Nation's inherent right to self-government – The Board addressed the concept of aboriginal rights and considered the test to be applied in determining whether a right has been established – Citing *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – Constitutional question answered in the negative – Employer is obliged to bargain and the Minister may appoint a conciliator – On judicial review, the Court held that the Board had jurisdiction

to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the First Nation had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the court held that the Board had the statutory authority to conduct the proceedings as it did – Application for judicial review dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB ..... (May/June) 450

Reference – Conciliation – The Minister asked whether he had the authority to appoint a conciliation officer, where the union gave the employer notice to bargain eight years after the collective agreement, containing no renewal clause, had expired – The employer did not assert that the union had abandoned its bargaining rights – The Board found that while s. 59(1) precludes notice from being given until the final 90 days of the collective agreement, it does not provide that notice may only be given in the final 90 days – Therefore the notice of intent to bargain was a valid s. 59(1) notice – The Board's advice to the Minister was that he had the authority to appoint a conciliation officer

EVANS LUMBER AND BUILDERS SUPPLY LIMITED; RE WAREHOUSEMEN, TRANSPORTATION AND GENERAL WORKERS UNION, LOCAL 715 .. (Mar./Apr.) 149

Related Employer – Adjournment – Certification – Construction Industry – Practice and Procedure – Sale of a Business – Unfair Labour Practice – The responding parties sought an adjournment of these proceedings because of a pending criminal trial involving the employer's representative and an employee – The responding parties argued that because of an Undertaking Given to a Peace Officer, the employer's representative was prohibited from "going to anyplace" the employee was to be (he was a potential witness in these proceedings) – Once the Board established that the employee was not in attendance, it ordered the employer's representative to appear at the hearing – The Board refused to adjourn its proceedings: first, there was no consent to the request; second, the Board gives priority to serious allegations of unfair labour practices; third, the personal concerns of the employer's representative do not attract the same level of concern as do the interests of the parties; fourth, the Board is not in a position to remedy conflicts of loyalties a person may have (between self-interest and the interests of the employer) – Matters referred to Registrar to set hearing dates

NORTHLAND PROPERTIES CORPORATION; VANDALAY CONTRACTING INC.; RE LIUNA LOCAL 506..... (Mar./Apr.) 245

Related Employer – Bargaining Rights – Sale of a Business – The union filed an application to extend their bargaining rights from Serco to Edwards Door Systems Limited (EDSL) – Serco closed down its installation and service work operation and entered into an "exclusive distributor" arrangement with EDSL for the sale and service of its equipment and warranty claims and the management of existing accounts - The union claimed that this arrangement was either a sale of business or it constituted associated or related businesses activities under subsection 1(4) – The sale of a business application was dismissed by the Board as there was nothing that could be identified as a business that was obtained from Serco – No assets, ongoing contracts or business relationships,

organizational or managerial expertise and employees were transferred – With respect to the related employer argument, the Board did not find that there was any common control or direction – The exclusive distributorship did not amount to an instrument of control as EDSL was not obliged to do anything, and Serco was not controlled by EDSL - Application dismissed

SERCO CANADA LTD; AND/OR DOCK PRODUCTS CANADA INC., SPX CANADA INC. AND/OR EDWARDS DOOR SYSTEMS LIMITED; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRONWORKERS, LOCAL 700 ..... (Mar./Apr.) 290

Related Employer – Bargaining Rights – Sale of a Business – Unfair Labour Practice – Five applicant unions sought declarations that the City of Toronto and Toronto Community Housing Corporation ("TCHC") were either a single employer pursuant to s. 1(4) of the Act, or TCHC was a successor to the City – CUPE Local 416 also complained that the employers had committed an unfair labour practice by attempting to defeat or interfere with the union's bargaining rights – The TCHC subsequently filed an application for a declaration that there had been a sale of a business from the City to TCHC – On February 21, 2002, the Board declared TCHC to be a successor to the City - By "bottom line" decision dated March 3, 2005, the Board dismissed the s. 1(4) applications and the unfair labour practice complaint – The Board provides a detailed history of the evolution of social housing in Toronto, the culmination of which was the creation of the TCHC, an arm's length entity responsible for the governance of public housing (with the City as sole shareholder) – TCHC employees, some of whom previously enjoyed membership in city-wide bargaining units, were now in stand-alone bargaining units separate from other city employees – The unions argued that the change in representation would undermine their bargaining strength, facilitate contracting out, and reduce mobility rights – The Board found that in the five years subsequent to the creation of the TCHC, the City had not been involved in any of the TCHC's labour relations, nor had the Board seen any evidence of contracting out – Despite production of voluminous materials by the City and TCHC, there was no evidence of any anti-union animus – The Board found the creation of the new housing model was based solely on legitimate business considerations, and stated that the purpose of s. 1(4) is to preserve bargaining rights but not any particular bargaining structure – Applications dismissed

CITY OF TORONTO AND TORONTO COMMUNITY HOUSING CORPORATION; RE IBEW, LOCAL 353; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 46; CARPENTERS AND ALLIED WORKERS LOCAL 27; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; TORONTO CIVIC EMPLOYEES' UNION, LOCAL 416; CUPE; OPSEU ..... (Sept./Oct.) 681

Related Employer – Construction Industry – Remedies – Sale of Business – In this 69/1(4) application, a construction project was bid, obtained and undertaken by three separate non-unionized corporations: WSM (general contractor), Humphrey (a mechanical contractor) and South Side (a plumbing sub-contractor) – The applicant union was successful at certifying South Side, after which Morgan, the owner, President and sole Director of South Side and WSM, moved the plumbing work at South Side to Humphrey and WSM to avoid the application of the applicant's Provincial ICI collective agreement – The Board found there was no disposition of a business within the purview of s. 69, but did find that the three corporations were one employer for the purposes of s. 1(4) – The Board found on these rare and specific facts that a full related employer declaration in

respect of Humphrey would operate to extend rather than preserve the applicant's bargaining rights – Since this result would be neither fair nor appropriate the Board exercised its "or otherwise" discretion under s. 1(4) and fashioned a remedy only binding Humphrey to the applicant's collective agreement when it engaged in construction industry work with South Side and WSM – Sale of business application dismissed; Related employer application granted

HUMPHREY PLUMBING & ELECTRICAL SERVICE LTD., SOUTH SIDE LTD. AND W.S. MORGAN CONSTRUCTION LIMITED; RE UA, LOCAL 599.. (July/Aug.) 519

Related Employer – Construction Industry – Aecon Industrial and Aecon Buildings agreed that they carry on associated or related activities under common control and direction; however, they asserted that the Board ought not to exercise its discretion to declare the companies related – The Board found that AI and AB had long-rooted presence in different markets in the construction industry and that the evidence of eight years of projects showed: AI had not wavered from its historical focus as a constructor of heavy industry manufacturing operations; AI had not diverted work to AB; and most significantly, there was no evidence of movement of heavy industrial plant work from AI to AB – Since the applicant's bargaining rights had not been harmed by the continued existence and prosperity of AB, the Board declined to make a single employer declaration – Application dismissed

AECON BUILDINGS AND AECON INDUSTRIAL; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 30 ..... (Mar./Apr.) 125

Related Employer – Construction Industry – Judicial Review – Public Sector Labour Relations Transition Act – Sale of Business – Stay –The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – Subsequent to its related employer decision the Board scheduled a grievance, alleging a failure to comply with the provincial agreement, involving some of the parties, which had been adjourned pending the related employer application – The School Board brought an application for a stay to Divisional Court pending the hearing of its judicial review application on the finding of relatedness – The Court dismissed the motion noting that the parties had secured an early date for the judicial review application, and while commenting that there "may be some benefit gained by the parties" if the grievance was adjourned pending the outcome of the judicial review application, the Court left that issue to be determined by the Board, given the slow pace with which the litigation had been advanced – Motion for stay dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773 et al..... (May/June) 473

Related Employer – Construction Industry – Parties – Sale of Business – Settlement – The IBEW Construction Council filed a related employer/sale of business application against the responding parties – The responding parties brought a preliminary motion to dismiss the application, relying on a settlement signed in 1999 by IBEW Local 586 and the responding parties – The parties to the Minutes of Settlement were Local 586 and the employers, but one clause purported to bind the Council and any of its affiliates and bar them from filing related employer/sale of business applications for a ten-year period – Although the individual who signed the agreement on behalf of Local 586 was also President of the Council, there was no evidence that he had actual or ostensible authority

to bind the Council – The Board held that the Council cannot be bound to the 1999 agreement – Preliminary motion dismissed – Matter continues

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO ..... (Mar./Apr.) 173

Related Employer – Employment Standards – Three applicant companies appealed the employment standard officer's order that they owed termination and severance pay to nearly 100 employees as a result of a finding that they were related businesses to "C", a bankrupt company, and should be treated as one employer pursuant to s. 4 – The Board found that s. 4 requires a finding that both subsections (a) and (b) must be answered positively before there is a declaration of one employer under the section – There must be more than the mere fact that one company is solvent and the other not, before it amounts to an "effect" under the Act – That is, there must be some connection between the relationship and the insolvency – The Board found there was no evidence that the insolvency of C was caused or affected by its relationship with two of the companies, nor any evidence that any action taken in respect of the third company had the effect, either indirectly or directly, on the entitlements of the employees – Finally, the Board noted that it would not examine whether the principal of C personally had more money to invest in the company, since it would be inappropriate to examine the actions or holdings or personal worth outside the corporation – Application granted; direction to return the monies held in trust

NOVAQUEST FINISHING INC.; RE ABDURAHMAN ABDOULRAB, JOSEPHINE ADRES, ET AL AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Mar./Apr.) 248

Related Employer – Judicial Review – Sale of Business – On judicial review the court found that the standard was patent unreasonableness, that there was evidence to support the Board's finding that Courtney Wheeler was a key man, that the Board was entitled to draw the conclusions that it did from the evidence, and that it made no error with respect to the application of s. 126(5)2 – Application for judicial review dismissed

C.M.G. INNOVATIONS CO. LTD.; RE OLRB; RE ONTARIO PIPE TRADES COUNCIL, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES OF AMERICA AND CANADA, LOCAL 819, CORNWALL & DISTRICT CONTRACTING LTD.; RE CITY & DISTRICT STEEPLEJACKS LIMITED, AND CHRISTIAN LABOUR ASSOCIATION OF CANADA, LOCAL 52 ..... (Nov./Dec.) 853

Related Employer – *Prima Facie* Case – Sale of Business – In order to build and operate a diamond mine, De Beers needed to construct an energy transmission line – Pursuant to the *Transmission Systems Code*, De Beers elected to build the line itself and upon completion would then be required to transfer ownership of the line to Hydro One – This process was established in a decision rendered by the Ontario Energy Board and was then implemented into the *Code* – Hydro One and De Beers brought two motions asking the Board to dismiss the Labourers' 69/1(4) applications without a hearing – The respondents sought to have the application dismissed as a collateral attack on the decision of the Ontario Energy Board and as disclosing no *prima facie* case – The Board determined that the application does not seek to attack or undermine the legal effect or order of the

decision of the Ontario Energy Board, and is thus not a collateral attack – Although the Ontario Energy Board decision establishes that companies have the freedom to choose who they want to construct transmission lines, the issue of collective agreements and restrictions on contracting were not addressed in the decision – The Board confirmed that the test for a *prima facie* case is high and discretion to dismiss a complaint on this basis should only be exercised in the clearest of cases – The Board dismissed the respondents' *prima facie* motion as the conveyance of the transmission line upon completion raises a sufficient case such that it cannot be said that the application stands no reasonable chance of success – Matter continues

DE BEERS CANADA INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; HYDRO ONE INC. (INCLUDING: HYDRO ONE N ETWORKS INC., HYDRO ONE NETWORKS SERVICES INC., HYDRO ONE REMOTE COMMUNITIES INC.).....(Nov./Dec.) 792

Related Employer – Sale of Business – Construction Industry – Construction Industry Grievance – In this application under sections 1(4) and 69 and referral of a grievance, the material facts were not in dispute – A father owned and operated the alleged predecessor company, PJH&P, which was bound to both an ICI collective agreement and a residential agreement with the applicant – An agreement of purchase and sale entered into with his son provided for the transfer of a list of assets including trucks, plumbing, pipefitting, and sheet metal material, furnaces and machinery – The son incorporated his business which became JJP&H – PJH&P was no longer operational, and the father had no involvement in his son's company – The Board held that there was no common control or direction between the entities as required under section 1(4) of the Act – With respect to the sale of business provisions, the Board determined that at the time of transfer, what enabled JJP&H to enter the market and operate effectively was the business of PJH&P – There was not only the use of equipment and the use of employees, but the transfer of every element of the business other than the owner – Accordingly, the Board held that a functional coherent business unit was transferred to JJP&H in its entirety – In finding a transfer of business occurred, the Board held that the applicant union's established rights should be preserved – Application granted

JANZEN PLUMBING & HEATING LTD.; PETER JANZEN HEATING & PLUMBING INC; JAMIE JANZEN PLUMBING & HEATING; RE ONTARIO PIPE TRADES COUNCIL AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 666 .....(Jan./Feb.) 72

Remedies – Bargaining Rights – Discharge for Union Activity – Interim Relief – Unfair Labour Practice – The union sought interim reinstatement pursuant to section 98 of an employee who, the union asserted, was an inside union organizer and was discharged for her organizing activity – The employer asserted that the employee was terminated due to her own misconduct (using profanity on the production floor) in accordance with its policies and procedures and without anti-union animus – The Board was satisfied that interim relief was necessary to prevent irreparable harm or to achieve other significant labour relations objectives, as her termination, as a supporter of the union and key inside organizer, may have a detrimental effect on the union's organizing drive – The Board was not concerned that the reinstatement of the employee could put the business at risk for the following reasons: the company did not immediately remove the employee from the workplace when it learned of the transgression, although it could have under its policy; the employee swore 4-5 times in four years, but only one time was it on the

production floor and the company concedes that one instance of swearing on the production floor does not always result in termination; and lastly, there was no suggestion that there had ever been a client complaint arising out of the employee's use of profanity – In regards to s. 98(3), where there are numerous and significant factual disputes, the Board stated that it must assess the two stories and ask itself whether it appears the conduct of the employer is (applying the Board's experience) that of an employer which is engaged in a process free of anti-union animus – The Board held that it did not appear that the employer's decision to discharge the employee was unrelated to her exercise of rights under the Act and reinstatement is therefore an appropriate remedy – Reinstatement and posting ordered

SITEL CUSTOMER CARE INC.; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ..... (July/Aug.) 625

Remedies – Construction Industry – Related Employer – Sale of Business – In this 69/1(4) application, a construction project was bid, obtained and undertaken by three separate non-unionized corporations: WSM (general contractor), Humphrey (a mechanical contractor) and South Side (a plumbing sub-contractor) – The applicant union was successful at certifying South Side, after which Morgan, the owner, President and sole Director of South Side and WSM, moved the plumbing work at South Side to Humphrey and WSM to avoid the application of the applicant's Provincial ICI collective agreement – The Board found there was no disposition of a business within the purview of s. 69, but did find that the three corporations were one employer for the purposes of s. 1(4) – The Board found on these rare and specific facts that a full related employer declaration in respect of Humphrey would operate to extend rather than preserve the applicant's bargaining rights – Since this result would be neither fair nor appropriate the Board exercised its "or otherwise" discretion under s. 1(4) and fashioned a remedy only binding Humphrey to the applicant's collective agreement when it engaged in construction industry work with South Side and WSM – Sale of business application dismissed; Related employer application granted

HUMPHREY PLUMBING & ELECTRICAL SERVICE LTD., SOUTH SIDE LTD. AND W.S. MORGAN CONSTRUCTION LIMITED; RE UA, LOCAL 599 .. (July/Aug.) 519

Remedies – Construction Industry Grievance – The employer filed a grievance asking the Board to order the union to return a $50,000 bank draft, which was delivered to the union three years earlier to secure payment of contributions that might have been found owing either as a result of an audit that was to be conducted, or for future violations – There was no evidence of an audit having been done or violations of the collective agreement – The Board found no reason not to order the bank draft or equivalent money returned to the company – The Board made the order effective three weeks hence to give the union time to file a grievance and refer it to arbitration to establish any liability it may be able to establish – Grievance allowed

1210166 ONTARIO LTD. (C.O.B. D.C.C. CARPENTRY); RE CARPENTERS AND ALLIED WORKERS LOCAL 27, CJA ..... (Mar./Apr.) 121

Remedies – Discharge – Discharge for Union Activity – Interim Relief – Unfair Labour Practice – Two union organizers were terminated in the midst of an organizing campaign and the union asked the Board to reinstate them on an interim basis pending resolution of the complaint – The employer argued it had terminated the two employees for cause, based on allegations of absenteeism and various performance and attitude issues – Neither of the employees had ever been disciplined nor had they received complaints from the

employer prior to their terminations – The employer was aware that the two individuals were union supporters – The employees were notified about their terminations through email messages – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint – In doing so, the Board acknowledged that the period of time between an application for certification and the ultimate disposition is a particularly difficult one for a union in terms of maintaining the confidence of its supporters – The Board found the union would suffer irreparable harm in terms of erosion of support if interim relief of reinstatement was not granted and that the balance of harm favoured granting the order – Interim reinstatement ordered

AXA ELECTRIC INC.; RE IBEW LOCAL 353 .....(Nov./Dec.) 766

Remedies – Discharge – Interim Relief – Unfair Labour Practice – OLGC discharged a part-time Security Officer, who was a supporter of the union's organizing campaign, as a result of a pattern of unpredictable, volatile and disruptive behaviour – The parties agreed that the events occurred during an organizing campaign and there was a serious issue to be tried – On balance of harm the Board found that the interim reinstatement of the security officer would expose OLGC to unreasonable risk since the security officer may not be able to perform his duties safely and appropriately and he could be disruptive in the workplace – Furthermore since the union's organizing drive commenced 18 months prior to the security officer's discharge, the application was filed over two weeks after the discharge, and there were no substantial allegations that he was a key inside organizer, the Board found there was not significant harm to PSAC – Accordingly, the Board did not find the balance of harm favoured granting the interim application – Application for interim relief dismissed

ONTARIO LOTTERY AND GAMING CORPORATION; RE PUBLIC SERVICE ALLIANCE OF CANADA .....(Jan./Feb.) 95

Representation Vote – Bargaining Unit – Certification – Employer – In this application for certification, the employer gave numerically significant notice under s. 8.1 of the Act, arguing that workers supplied to it by an employment agency (Manpower) were in fact its employees – The union agreed that if the Manpower workers were found to be employed by Nike, the application would have to be dismissed because the union did not have the support of 40% of the bargaining unit – The Board considered the criteria articulated in *York Condominium* to determine the identity of the employer – The Board found that Nike bears the ultimate burden of remuneration; Nike has the authority to determine whether a temporary employee continues to work for it; although the employees were hired by Manpower, Nike can tell Manpower not to send back an employee; Nike has the power to dismiss; the degree of integration of the workers supplied by Manpower into Nike's business strongly points to Nike being the employer – Ultimately, the Board concluded that it is Nike which exercises fundamental control over the workers supplied by Manpower – Application dismissed under section 8.1(5)7 of the Act

NIKE CANADA LTD.; RE UFCW, LOCAL 1000A .....(July/Aug.) 574

Representation Vote – Certification – Charter of Rights and Freedoms – Practice and Procedure – Standing – In this application for certification, the employer sought a declaration that the representation vote was void, that a new vote should be ordered, and that the Board either translate the ballots into Chinese and Punjabi, and/or allow the presence and use of an interpreter to assist the voters at the vote – Issues addressed were: does the employer have standing to raise arguments relating to the Charter in this case; did the Board violate sections 2(d) and/or 14 and/or 15(1) of the Charter in refusing to allow translated ballots

or the presence of interpreters at the vote; if the Board did violate sections 2(d) or 14 or 15 of the Charter is it justified under section 1 of the Charter; did the Board violate section 5 and 6 of the Ontario Human Rights Code in refusing to allow translated ballots and the presence of translators at the vote – The Board saw no reason to allow standing in a situation of a long established practice where no employee raises the issue despite numerous notices posted – The Board also considered the other issues and was not persuaded that the vote, as carried out, had breached either the Charter or the Code – The Board held that the certification process and representation vote procedures are not protected activities under s. 2(d) – The Board held s.14 to only be available to parties or witnesses, and since the individual employees, on whose behalf relief was sought, were neither parties to this application nor witnesses, the section did not apply – The Board adopted the reasoning from R-Theta Inc. and found no breach of s.15 – Certificate issued

MAPLE LEAF CONSUMER FOODS INC.; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS)..... (July/Aug.) 558

Representation Vote – Certification – Employer Support – Trade Union – In this application for certification the Board considered whether section 15 of the Act was contravened, that is whether the employer provided financial or other support to the applicant – The Board concluded that the Association was precluded from becoming certified for the following reasons: the Association's sole source of start-up and ongoing operating funding was the employer; no dues deductions were authorized; it was not relevant whether the funding was provided directly or indirectly by the employer as it was still financial support; the employer provided free office space, a significant amount of relief time, and paid for all arbitration proceedings; and the Association's membership was limited to non-union employees holding permanent positions thus giving management control of membership through its hiring decisions – All of this amounted to improper employer support – Application dismissed

UNIVERSITÉ D'OTTAWA : RE : ASSOCIATION DES EMPLOYÉ(E)S DE L'UNIVERSITÉ D'OTTAWA [AEUO]..... (May/June) 444

Representation Vote – Certification – The employer challenged the Returning Officer's determination that one ballot was spoiled in the representation vote held in this matter – The ballot, although it indicated the voter's preference in the appropriate way, was also marked by what appeared to be initials – The Board surveyed its jurisprudence on spoiled ballots and a majority held that on its face the impugned ballot potentially revealed the identity of the voter and consequently cast doubt on the voter's preference – The Board held the ballot was a nullity and could not be counted – Certificate issued

INTERNATIONAL COLD STORAGE 2003 INC.; RE TEAMSTERS LOCAL UNION NO. 419..... (July/Aug.) 546

Reprisal – Damages – Employment Standards – The applicant claimed he was terminated for insisting on receiving public holiday pay under the Act – Shortly after the applicant had challenged the company's treatment of holiday pay, the company reduced the applicant's shifts – The company provided the Board with no explanation of this reduction in work – Four weeks later, after a heated argument with a manager, the applicant was terminated – The Board found the reduction in shift work and the termination were both reprisals under the Act – The Board ordered the company to pay the applicant lost wages for loss of shift work and, subject to mitigation, his lost wages between termination and the

finding of another position

KEROMENA HOLDINGS LTD. AND DIRECTOR OF EMPLOYMENT STANDARDS; RE MUHAMMAD JAMIL KHATTAK ..... (Mar./Apr.) 179

Reprisal – Discharge – Employment Standards – The Board reviewed an employment standards officer's finding that the claimant's termination did not result from a reprisal contrary to section 74 of the Act – The employer argued the claimant was terminated solely for circulating a petition to disband the dock committee – Circulating a petition was found not to be a protected activity under section 74 – The Board found however, that the petition was not the only reason for termination – The employee engaged in protected activity when he discussed hours of work and other rights under the Act with his coworkers – The employer was aware that the claimant was engaged in those discussions – The employer penalized the employee by way of termination – The employer intended to terminate because of those discussions – Remedial issues continue

NATIONAL FAST FREIGHT ; RE KARL M. ELLISON AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (July/Aug.) 389

Reprisal – Health and Safety – An employee filed an application under section 50 of the Act alleging that his employer terminated him after his refusal to continue digging a hole near live electrical cables – Fern Roy Contractors ("FRC") contracted with Transport Personnel Services Inc. ("TPSI"), a staffing agency, for the applicant's services as a general labourer to remove a stone retaining wall on a residential property – The Board determined that FRC's on-site supervisor mishandled the refusal by becoming angry and failing to investigate the applicant's concern while the employer, TPSI, engaged in an unlawful reprisal by terminating the applicant for having sought the enforcement of the Act – The company was ordered by the Board to reinstate the employee immediately and to pay lost wages – Application granted

TRANSPORT PERSONNEL SERVICES INC. ; RE AARON MACELWEE ; RE FERN ROY CONTRACTORS ..... (Jan./Feb) 99

Reprisal – Health and Safety – Judicial Review – The employee sought redress for discipline instituted against him arising out of two separate incidents in the workplace – The Board found there was no anti-safety animus on the earlier event, and the applicant had no objective grounds for engaging in a work refusal in the second occurrence – On judicial review the Court held the Board's findings were not irrational and no reviewable error was made – Application dismissed; Board decision not reported.

ROOKE, JOSEPH; RE STELCO HAMILTON AND THE OLRB AND THE MINISTRY OF THE ATTORNEY GENERAL FOR ONTARIO ..... (July/Aug.) 645

Sale of a Business – Adjournment – Certification – Construction Industry – Practice and Procedure – Related Employer – Unfair Labour Practice – The responding parties sought an adjournment of these proceedings because of a pending criminal trial involving the employer's representative and an employee – The responding parties argued that because of an Undertaking Given to a Peace Officer, the employer's representative was prohibited from "going to anyplace" the employee was to be (he was a potential witness in these proceedings) – Once the Board established that the employee was not in attendance, it ordered the employer's representative to appear at the hearing – The Board refused to adjourn its proceedings: first, there was no consent to the request; second, the Board gives priority to serious allegations of unfair labour practices; third, the personal concerns

of the employer's representative do not attract the same level of concern as do the interests of the parties; fourth, the Board is not in a position to remedy conflicts of loyalties a person may have (between self-interest and the interests of the employer) – Matters referred to Registrar to set hearing dates

NORTHLAND PROPERTIES CORPORATION; VANDALAY CONTRACTING INC.; RE LIUNA LOCAL 506 ..... (Mar./Apr.) 245

Sale of Business – Bargaining Rights – Collective Agreement – The applicant unions sought a declaration that there has been a sale of business from the former Ontario Hydro to the Independent Electricity System Operator ("IESO") – CUSW sought a declaration that the IESO thereby became bound by the bargaining rights held by CUSW for employees of the former Ontario Hydro and that CUSW is entitled to give notice to bargain to the IESO – LIUNA similarly sought a declaration that the IESO became bound by various collective agreements binding LIUNA and the former Ontario Hydro as a consequence of the sale of business and are therefore entitled to give notice to bargain regarding those collective agreements – The IESO was established by the *Electricity Act* (E.A.) as a not-for-profit, non-share capital corporation through re-organizing the former Ontario Hydro – The applicant unions submitted that the IESO acquired the assets, liabilities, responsibilities and functions of the Central Market Operator ("CMO") business unit of the former Ontario Hydro and this unit was responsible for the electricity grid – The unions claim the IESO continued to perform that function, albeit in a different manner, following the enactment of the E.A. – The responding party submitted that the IESO is a brand new organization, which is independently involved in setting the market prices for electricity and also has responsibility to oversee the reliability of the electricity grid in Ontario – With respect to CUSW, the responding party contends that CUSW never had a collective agreement with the former Ontario Hydro or with the IESO and that CUSW made no claim for bargaining rights in a timely fashion – With respect to LIUNA, the responding party contends that LIUNA never sought to engage in collective bargaining with the IESO and that it was not clear to the IESO that LIUNA was asserting bargaining rights until after the mediation meeting – The Board held that, from a review of the E.A. and the Transfer Order there was a transfer or disposition from the former Ontario Hydro to the IESO meeting the first requirement of a "sale of business" – At issue was whether what was transferred to the IESO under the terms of the legislation can be characterized as part of the "business" of the former Ontario Hydro within the meaning of section 69 of the *LRA* – When the Board considered what is meant by "business" or part of a business in section 69, the Board looked at the essential elements of the given undertaking and whether a coherent grouping of those elements had been transferred – The factors the Board considers include; the absence of a hiatus in operations following the transfer, the extent to which the transferee derives its ability to carry on business following that which was transferred, and whether the transferor subsequently ceased to carry on business – The evidence before the Board showed that virtually all the assets and liabilities of the CMO business unit were transferred to the IESO, and there was little that changed in the day-to-day functions of the employees who were transferred to the IESO at the time of the de-merger – The Board held that the fact that the IESO carries out what is substantially the same responsibility in respect of reliability in a somewhat different manner does not imply that there has been a change in the character of the business following the transfer – The Board has recognized that there are inevitable changes in the manner in which a new entity will carry on business, particularly where only a part of a business of the predecessor has been transferred – The Board rejected the suggestion that, no sale of the business declaration should issue since there was no transfer of the construction part of the business of the former Ontario Hydro to the IESO to which the applicant bargaining rights apply – The Board further recognized that a period of

apparent inactivity by a trade union asserting its rights will not necessarily indicate that the union has abandoned its bargaining rights, particularly where that period of inactivity occurs in a period in which there are no employees working in the bargaining unit – The Board found that neither CUSW nor LIUNA abandoned their bargaining rights in respect of the IESO, as alleged – The Board held the bargaining rights of CUSW and LIUNA continue in this new entity and IESO is bound to the collective agreements

ONTARIO ELECTRICITY FINANCIAL CORPORATION AND INDEPENDENT ELECTRICITY SYSTEM OPERATOR; RE CANADIAN UNION OF SKILLED WORKERS; LIUNA, LIUNA ONTARIO PROVINCIAL DISTRICT COUNCIL AND LIUNA, LOCAL 1059 ..... (July/Aug.) 594

Sale of a Business – Bargaining Rights – Related Employer – The union filed an application to extend their bargaining rights from Serco to Edwards Door Systems Limited (EDSL) – Serco closed down its installation and service work operation and entered into an "exclusive distributor" arrangement with EDSL for the sale and service of its equipment and warranty claims and the management of existing accounts - The union claimed that this arrangement was either a sale of business or it constituted associated or related businesses activities under subsection 1(4) – The sale of a business application was dismissed by the Board as there was nothing that could be identified as a business that was obtained from Serco – No assets, ongoing contracts or business relationships, organizational or managerial expertise and employees were transferred – With respect to the related employer argument, the Board did not find that there was any common control or direction – The exclusive distributorship did not amount to an instrument of control as EDSL was not obliged to do anything, and Serco was not controlled by EDSL - Application dismissed

SERCO CANADA LTD; AND/OR DOCK PRODUCTS CANADA INC., SPX CANADA INC. AND/OR EDWARDS DOOR SYSTEMS LIMITED; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRONWORKERS, LOCAL 700 ..... (Mar./Apr.) 290

Sale of a Business – Bargaining Rights – Related Employer – Unfair Labour Practice – Five applicant unions sought declarations that the City of Toronto and Toronto Community Housing Corporation ("TCHC") were either a single employer pursuant to s. 1(4) of the Act, or TCHC was a successor to the City – CUPE Local 416 also complained that the employers had committed an unfair labour practice by attempting to defeat or interfere with the union's bargaining rights – The TCHC subsequently filed an application for a declaration that there had been a sale of a business from the City to TCHC – On February 21, 2002, the Board declared TCHC to be a successor to the City - By "bottom line" decision dated March 3, 2005, the Board dismissed the s. 1(4) applications and the unfair labour practice complaint – The Board provides a detailed history of the evolution of social housing in Toronto, the culmination of which was the creation of the TCHC, an arm's length entity responsible for the governance of public housing (with the City as sole shareholder) – TCHC employees, some of whom previously enjoyed membership in city-wide bargaining units, were now in stand-alone bargaining units separate from other city employees – The unions argued that the change in representation would undermine their bargaining strength, facilitate contracting out, and reduce mobility rights – The Board found that in the five years subsequent to the creation of the TCHC, the City had not been involved in any of the TCHC's labour relations, nor had the Board seen any evidence of contracting out – Despite production of voluminous materials by the City and TCHC, there was no evidence of any anti-union animus – The Board found the creation of the new housing model was based solely on legitimate business considerations, and

stated that the purpose of s. 1(4) is to preserve bargaining rights but not any particular bargaining structure – Applications dismissed

CITY OF TORONTO AND TORONTO COMMUNITY HOUSING CORPORATION; RE IBEW, LOCAL 353; UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 46; CARPENTERS AND ALLIED WORKERS LOCAL 27; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ; TORONTO CIVIC EMPLOYEES' UNION, LOCAL 416; CUPE; OPSEU ..... (Sept./Oct.) 681

Sale of Business – Construction Industry – Construction Industry Grievance – Related Employer – In this application under sections 1(4) and 69 and referral of a grievance, the material facts were not in dispute – A father owned and operated the alleged predecessor company, PJH&P, which was bound to both an ICI collective agreement and a residential agreement with the applicant – An agreement of purchase and sale entered into with his son provided for the transfer of a list of assets including trucks, plumbing, pipefitting, and sheet metal material, furnaces and machinery – The son incorporated his business which became JJP&H – PJH&P was no longer operational, and the father had no involvement in his son's company – The Board held that there was no common control or direction between the entities as required under section 1(4) of the Act – With respect to the sale of business provisions, the Board determined that at the time of transfer, what enabled JJP&H to enter the market and operate effectively was the business of PJH&P – There was not only the use of equipment and the use of employees, but the transfer of every element of the business other than the owner – Accordingly, the Board held that a functional coherent business unit was transferred to JJP&H in its entirety – In finding a transfer of business occurred, the Board held that the applicant union's established rights should be preserved – Application granted

JANZEN PLUMBING & HEATING LTD.; PETER JANZEN HEATING & PLUMBING INC; JAMIE JANZEN PLUMBING & HEATING; RE ONTARIO PIPE TRADES COUNCIL AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 666 .....(Jan./Feb.) 72

Sale of Business – Construction Industry – Judicial Review – Public Sector Labour Relations Transition Act – Related Employer – Stay –The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – Subsequent to its related employer decision the Board scheduled a grievance, alleging a failure to comply with the provincial agreement, involving some of the parties, which had been adjourned pending the related employer application – The School Board brought an application for a stay to Divisional Court pending the hearing of its judicial review application on the finding of relatedness – The Court dismissed the motion noting that the parties had secured an early date for the judicial review application, and while commenting that there "may be some benefit gained by the parties" if the grievance was adjourned pending the outcome of the judicial review application, the Court left that issue to be determined by the Board, given the slow pace with which the litigation had been advanced – Motion for stay dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773 et al..... (May/June) 473

Sale of Business – Construction Industry – Parties – Related Employer – Settlement – The IBEW Construction Council filed a related employer/sale of business application against the responding parties – The responding parties brought a preliminary motion to dismiss the application, relying on a settlement signed in 1999 by IBEW Local 586 and the responding parties – The parties to the Minutes of Settlement were Local 586 and the employers, but one clause purported to bind the Council and any of its affiliates and bar them from filing related employer/sale of business applications for a ten-year period – Although the individual who signed the agreement on behalf of Local 586 was also President of the Council, there was no evidence that he had actual or ostensible authority to bind the Council – The Board held that the Council cannot be bound to the 1999 agreement – Preliminary motion dismissed – Matter continues

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO ..... (Mar./Apr.) 173

Sale of Business – Construction Industry – Related Employer – Remedies – In this 69/1(4) application, a construction project was bid, obtained and undertaken by three separate non-unionized corporations: WSM (general contractor), Humphrey (a mechanical contractor) and South Side (a plumbing sub-contractor) – The applicant union was successful at certifying South Side, after which Morgan, the owner, President and sole Director of South Side and WSM, moved the plumbing work at South Side to Humphrey and WSM to avoid the application of the applicant's Provincial ICI collective agreement – The Board found there was no disposition of a business within the purview of s. 69, but did find that the three corporations were one employer for the purposes of s. 1(4) – The Board found on these rare and specific facts that a full related employer declaration in respect of Humphrey would operate to extend rather than preserve the applicant's bargaining rights – Since this result would be neither fair nor appropriate the Board exercised its "or otherwise" discretion under s. 1(4) and fashioned a remedy only binding Humphrey to the applicant's collective agreement when it engaged in construction industry work with South Side and WSM – Sale of business application dismissed; Related employer application granted

HUMPHREY PLUMBING & ELECTRICAL SERVICE LTD., SOUTH SIDE LTD. AND W.S. MORGAN CONSTRUCTION LIMITED; RE UA, LOCAL 599 .. (July/Aug.) 519

Sale of Business – Judicial Review – Related Employer – On judicial review the court found that the standard was patent unreasonableness, that there was evidence to support the Board's finding that Courtney Wheeler was a key man, that the Board was entitled to draw the conclusions that it did from the evidence, and that it made no error with respect to the application of s. 126(5)2 – Application for judicial review dismissed

C.M.G. INNOVATIONS CO. LTD.; RE OLRB; RE ONTARIO PIPE TRADES COUNCIL, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES OF AMERICA AND CANADA, LOCAL 819, CORNWALL & DISTRICT CONTRACTING LTD.; RE CITY & DISTRICT STEEPLEJACKS LIMITED, AND CHRISTIAN LABOUR ASSOCIATION OF CANADA, LOCAL 52 .....(Nov./Dec.) 853

Sale of Business – *Prima Facie* Case – Related Employer – In order to build and operate a diamond mine, De Beers needed to construct an energy transmission line – Pursuant to the *Transmission Systems Code*, De Beers elected to build the line itself and upon completion would then be required to transfer ownership of the line to Hydro One – This process was established in a decision rendered by the Ontario Energy Board and was then implemented into the *Code* – Hydro One and De Beers brought two motions asking the Board to dismiss the Labourers' 69/1(4) applications without a hearing – The respondents sought to have the application dismissed as a collateral attack on the decision of the Ontario Energy Board and as disclosing no *prima facie* case – The Board determined that the application does not seek to attack or undermine the legal effect or order of the decision of the Ontario Energy Board, and is thus not a collateral attack – Although the Ontario Energy Board decision establishes that companies have the freedom to choose who they want to construct transmission lines, the issue of collective agreements and restrictions on contracting were not addressed in the decision – The Board confirmed that the test for a *prima facie* case is high and discretion to dismiss a complaint on this basis should only be exercised in the clearest of cases – The Board dismissed the respondents' *prima facie* motion as the conveyance of the transmission line upon completion raises a sufficient case such that it cannot be said that the application stands no reasonable chance of success – Matter continues

DE BEERS CANADA INC.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; HYDRO ONE INC. (INCLUDING: HYDRO ONE N ETWORKS INC., HYDRO ONE NETWORKS SERVICES INC., HYDRO ONE REMOTE COMMUNITIES INC.).....(Nov./Dec.) 792

Standing – Conflict of Interest – Trusteeship – In the continuing battle between LIUNA and Local 183, the trustee asked the Board to declare that 183's Jurisdictional Committee had no standing to continue in this litigation, and that 183's lawyers were in a conflict of interest because of their access to and knowledge of confidential information relating to the trusteeship – Given that the Committee was extinguished when the trusteeship was imposed, and that the trustee purported to dissolve the Committee in any event, the Board declared that the Committee was no longer an entity capable of continuing to participate in these matters; the two remaining members of the Committee were added as individual parties to this litigation – On the conflict issue, the Board held that the law firm possessed no confidential knowledge outside of what it had learned from its clients to support the litigation – Since there has been no change in positions, and no individual lawyers moving from one side of the litigation to the other, the Board found no conflict and allowed the firm to continue to represent its clients

UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE LIUNA ET AL .....(Nov./Dec.) 848

Standing – Construction Industry – Duty to Bargain in Good Faith – Unfair Labour Practice – To secure itself a subcontractor to install cedar shingles, SLR signed a collective agreement with the Carpenters, after having been told by the subcontractor that the Residential Roofing Agreement was standard across the province and included a letter of understanding specifying wage rates for cedar shingling – After the subcontractor abandoned its contract with SLR, and SLR was forced to pay another entity higher rates to complete the work, SLR complained that both the subcontractor and the Carpenters had violated sections 17 and 70 of the Act, because the agreement SLR was given to sign was not in fact standard across the province – The Board held that an employer has no standing to bring a complaint under s. 70, so that element of the application was

dismissed – With respect to the duty to bargain in good faith, the Board found that the Carpenters did not hold bargaining rights for the employees at the time that bargaining with SLR took place, so no such duty arose in the circumstances – Application dismissed

S.L.R. ROOFING AND SHEET METAL; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE ROBERT SHEWELL; RE 6221220 CANADA INC. O/A JIM'S ROOFING AND JIM LEBLANC .....(Nov./Dec.) 832

Stated Case – Construction Industry Grievance – Contempt – The Court found problems with the material before it respecting service on the respondents – The matter was adjourned to enable the applicant to either serve the respondents in accordance with the existing order or to obtain in Divisional Court motions court an order permitting service on some other basis – Matter adjourned

D.M.S. CONCRETE & GENERAL CONTRACTING INC.; RE OPERATIVE PLASTERERS' CEMENT MASONS' AND RESTORATION STEEPLEJACKS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, UNION LOCAL 598 AND ONTARIO LABOUR RELATIONS BOARD.....(Nov./Dec.) 854

Stated Case - Construction Industry Grievance - Contempt – The Board stated a case for contempt to Divisional Court when the responding party failed to attend a hearing or comply with production orders issued by the Board – When the responding party failed to appear at court, the Court found it to be in contempt of the Board and awarded a fine – The Court then made its own production order and adjourned the matter for one month to afford the responding party an opportunity to comply

D.M.S. CONCRETE & GENERAL CONTRACTING INC.; RE OPERATIVE PLASTERERS' CEMENT MASONS' AND RESTORATION STEEPLEJACKS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, UNION LOCAL 598 AND ONTARIO LABOUR RELATIONS BOARD.....(Nov./Dec.) 855

Status – Certification – Construction Industry – Employee – Membership Evidence – The responding party filed a timely response in this application for certification – The employer's primary position was that it had no employees in the bargaining unit because it was not the employer of the persons the applicant had sought to represent; it filed no names on its "Schedule A" – In the alternative, the responding party asserted there were seven more individuals than the four identified in the applicant's materials doing the same work on the application date; at the hearing the responding party sought to add the seven individuals to its "Schedule A" – The Board held that a responding party seeking to assert it is an employer of more individuals than the applicant has proposed must, pursuant to s. 128.1(3), provide the names of those individuals in a timely way, even if its submission relating to those individuals is an alternative position – Employer's motion to file the list of names after the two-day period set out in 128.1(3) dismissed – Matter continues

DESI'S ALUMINIUM CAMBRIDGE; RE CARPENTERS' UNION, CENTRAL ONTARIO REGIONAL COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA. .....(Sept./Oct.) 700

Sector Determination – Bargaining Unit – Certification – Construction Industry – Status – In this application for certification for a bargaining unit in all sectors in the construction industry other than the ICI, the status of five individuals was in dispute – Sector was a

disputed issue and the Board considered for the first time whether the "majority of time" test from *Gilvesy* should apply to a consideration of sector – The Board noted that it took a "snapshot" of what occurred on the date of application to determine which bargaining unit an employee was employed in – The Board has used the majority of time test to determine which trade of work an individual was performing and also to determine into which geographic area an individual worked (see *Advance Tile and Carpet*) – The Board found there was no material or principled distinction between identifying the geographic scope in which the employee was working on the date of application and the sector – Accordingly it was appropriate to apply a majority of time test, where the unit applied for does not encompass all sectors, to assess whether the person falls within the applicable sector – The Board upheld the union challenges to four of the five individuals – Certificate issued

EASTWAY CONSTRUCTION LTD.; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ..... (May/June) 341

Sector Determination – Construction Industry – Jurisdictional Dispute – Two sector determination applications were heard together to determine whether two construction projects came within the ICI or the electrical power systems sector (EPS) – The Board considered the meaning and scope of the EPS sector classification – The two construction projects were private sector initiatives aimed at assembling, erecting and installing sixty-six wind turbine electric generators with various affiliated transmission lines, transformers and substations – In examining whether or not the scope of the EPS sector should be restricted to projects taking place on what was once Ontario Hydro property, the Board reviewed the historical reasons for the creation of different construction industry sectors under the *LRA* – While the Board acknowledged that the 1978 Ellis Report indicated the primary focus of the EPS sector was traditionally on public sector power generation projects, the Board found the scope of the EPS sector was broad enough to include privately owned and developed construction projects and went beyond construction work done on what was once the property of Ontario Hydro – After determining that the scope of the EPS sector may include privately owned and operated construction projects, the Board considered which sector was more appropriate for the projects – Both the 'end use' of a construction industry project and the collective bargaining patterns of contractors were found to be relevant – As private power generation initiatives were a relatively new phenomenon, the Board recognized bargaining patterns for these kinds of projects had not yet had sufficient time to develop and emerge – As a result greater reliance was placed on the two projects' end use – While the applicant argued the projects' end use had a commercial aspect suggesting an ICI sector classification, the Board found the projects' end use to be predominantly aimed at the generation and transmission of power – Consequently, the two projects were deemed to fall within the EPS sector

LEO ALARIE AND SONS LIMITED; BLACK AND MCDONALD LIMITED; RE LIUNA AND LIUNA ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS, LOCAL 446; RE IUOE LOCAL 793; RE CANADIAN UNION OF SKILLED WORKERS; RE UNIVERSAL WORKERS' UNION, LOCAL 183; RE INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL 736; RE IBEW; RE CARPENTERS' DISTRICT COUNCIL OF ONTARIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AND ITS LOCAL 1592; RE ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION ..... (Sept./Oct.) 721

Settlement – Construction Industry – Parties – Related Employer – Sale of Business – The IBEW Construction Council filed a related employer/sale of business application against the responding parties – The responding parties brought a preliminary motion to dismiss the application, relying on a settlement signed in 1999 by IBEW Local 586 and the responding parties – The parties to the Minutes of Settlement were Local 586 and the employers, but one clause purported to bind the Council and any of its affiliates and bar them from filing related employer/sale of business applications for a ten-year period – Although the individual who signed the agreement on behalf of Local 586 was also President of the Council, there was no evidence that he had actual or ostensible authority to bind the Council – The Board held that the Council cannot be bound to the 1999 agreement – Preliminary motion dismissed – Matter continues

JOHNSON CONTROLS LTD., JOHNSON CONTROLS NOVA SCOTIA U.L.C., JOHNSON CONTROLS L.P., JOHNSON CONTROLS WORLD SERVICES LTD., BROOKFIELD MANAGEMENT SERVICES LTD. AND BROOKFIELD LEPAGE JOHNSON CONTROLS FACILITIES MANAGEMENT SERVICES LTD.; RE IBEW CONSTRUCTION COUNCIL OF ONTARIO ..... (Mar./Apr.) 173

Standing – Certification – Charter of Rights and Freedoms – Practice and Procedure – Representation Vote – In this application for certification, the employer sought a declaration that the representation vote was void, that a new vote should be ordered, and that the Board either translate the ballots into Chinese and Punjabi, and/or allow the presence and use of an interpreter to assist the voters at the vote – Issues addressed were: does the employer have standing to raise arguments relating to the Charter in this case; did the Board violate sections 2(d) and/or 14 and/or 15(1) of the Charter in refusing to allow translated ballots or the presence of interpreters at the vote; if the Board did violate sections 2(d) or 14 or 15 of the Charter is it justified under section 1 of the Charter; did the Board violate section 5 and 6 of the Ontario Human Rights Code in refusing to allow translated ballots and the presence of translators at the vote – The Board saw no reason to allow standing in a situation of a long established practice where no employee raises the issue despite numerous notices posted – The Board also considered the other issues and was not persuaded that the vote, as carried out, had breached either the Charter or the Code – The Board held that the certification process and representation vote procedures are not protected activities under s. 2(d) – The Board held s.14 to only be available to parties or witnesses, and since the individual employees, on whose behalf relief was sought, were neither parties to this application nor witnesses, the section did not apply – The Board adopted the reasoning from R-Theta Inc. and found no breach of s.15 – Certificate issued

MAPLE LEAF CONSUMER FOODS INC.; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ..... (July/Aug.) 558

Standing – Certification – Intimidation and Coercion – Unfair Labour Practice – The employer filed an unfair labour practice complaint, alleging that the responding party (CAW) intimidated its employees into voting in favour of the CAW during the representation vote – The applicant requested that the CAW's certification application be dismissed or that the Board order a second representation vote – The CAW argued that the applicant did not have standing to bring the application; in the alternative that it had waived its right to do so; and finally that no *prima facie* case had been pled in respect of intimidation or coercion – With respect to the first issue, the Board found that the

applicant had standing to bring its s. 96 application – The applicant was a party to the certification application, and therefore had a right to make submissions to the Board – On the second issue, the Board held that the applicant did not waive its right to bring a complaint – A waiver of the right to request another representation vote or of the right to request that the Board dismiss the application could only be triggered by an agreement between the two parties that the certification application be dismissed or that a final certificate be issued – Because there was no agreement, there was no waiver – On the final issue, the Board found that there were insufficient facts pled by the applicant to dismiss the certification application or to order a second representation vote – The Board noted that voters are reasonable and possessed of critical faculties, which enable them to recognize election propaganda for what it is – Further, the Board held that a reasonable voter would understand that the secrecy of the ballot boxes assures the integrity of the expression of voters' wishes – Even if the employer's allegations of intimidation and coercion were proven, the actions of the CAW did not result in the employees being deprived of the ability to express their true wishes – Application for certification granted – Section 96 application remitted back to the parties

MEWS CHEVROLET LTD.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) ..... (Mar./Apr.) 187

Status – Bargaining Unit – Certification – Construction Industry – Employee – The union applied to certify employees of the responding party in all sectors of the construction industry other than ICI – At the outset of the hearing, the parties agreed that the first issue to be dealt with was whether employees performing general landscape maintenance were working in the bargaining unit on the date of application – The employer sought to rely on a standard industry collective agreement which purported to include the work the employees were performing in the definition of construction work – The Board found that routine grounds maintenance at a site where no construction work was being carried out could not constitute "construction industry" work for purposes of the certification application – The Board held it could not look at the expanded definition of construction work in a collective agreement nor at landscaping industry practice to modify the Act or alter the scope of the provision of the Act pertaining to the construction industry – The employees in question were not properly on the list – Matter continues

HANK DEENEN LANDSCAPING LIMITED; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 ..... (July/Aug.) 513

Status – Bargaining Unit – Certification – Construction Industry – In this application for certification, the Board considered the status of an employee on the date of application and whether, should there be a finding that he was a dependent contractor, he could be included in a bargaining unit of "traditional" employees in light of the provisions of subsections 9(5) and 152(2) of the Act – In concluding that the employee in question was a dependent contractor and should be included in the bargaining unit, the Board held that there is a spectrum of work relationships where more or fewer of the various criteria pointing to employee or independent contractor status may be found – The Board found, however, that there was no need to distinguish between "traditional" employees and dependent contractors in a subsection 158(2) certification application, as the subsection mandates that both types of employees shall be included in one unit of employees, and that such unit shall be deemed appropriate for collective bargaining – Moreover, subsection 9(5) does not apply to subsection 158(2) due to the operation of section 126.1 of the Act – Accordingly, dependent contractors must be included in a single bargaining unit with other employees in a construction industry certification brought under

subsection 158(2) of the Act – Application granted

GREENVILLA DEVELOPMENT GROUP INC.; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 .....(Jan./Feb.) 63

Status – Bargaining Unit – Certification – Construction Industry – On the application date the challenged individual, a salaried employee who worked as an estimator and sometimes on the tools, spent part of the day doing wiring work (bargaining unit work) and the remainder of the day determining whether an electric control system installed in part of the building could be extended – The Board first found that the work of determining whether the system could be extended was similar to preparing estimates and was not work in the construction industry – The Board next found that the evidence did not establish that the individual was engaged in bargaining unit work for the majority of the application day – Accordingly, the Board examined other relevant factors (reason for hire was as an estimator; the employee never spent the entire day on the tools; he no longer held a valid Certificate of Qualification; as a salaried employee, he was generally not required to record his hours) and concluded that he was not an employee in the bargaining unit on the application date – Certificate issued

EVERBRITE INDUSTRIES LTD.; IBEW, LOCAL 353 .....(Jan./Feb.) 36

Status – Bargaining Unit – Certification – Construction Industry – Sector Determination – In this application for certification for a bargaining unit in all sectors in the construction industry other than the ICI, the status of five individuals was in dispute – Sector was a disputed issue and the Board considered for the first time whether the "majority of time" test from *Gilvesy* should apply to a consideration of sector – The Board noted that it took a "snapshot" of what occurred on the date of application to determine which bargaining unit an employee was employed in – The Board has used the majority of time test to determine which trade of work an individual was performing and also to determine into which geographic area an individual worked (see *Advance Tile and Carpet*) – The Board found there was no material or principled distinction between identifying the geographic scope in which the employee was working on the date of application and the sector – Accordingly it was appropriate to apply a majority of time test, where the unit applied for does not encompass all sectors, to assess whether the person falls within the applicable sector – The Board upheld the union challenges to four of the five individuals – Certificate issued

EASTWAY CONSTRUCTION LTD.; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS UNITED ARPENTERS AND JOINERS OF AMERICA..... (May/June) 341

Status – Certification – Construction Industry – Practice and Procedure – Reconsideration – During the hearing of status disputes in this application for certification, the applicant sought to admit a cleaning contract that would indicate one of the witnesses was cleaning a certain residence at the time of certification – The witness had already concluded her testimony and had claimed she did not clean the residence in question – The respondent objected to the admissibility of the contract on the basis of the rule in *Browne v. Dunn* and the Board sustained the objection – At the next hearing date, the applicant sought reconsideration of the procedural ruling – The Board considered the rule's proper application in the certification context: at no time had the applicant introduced the evidence during cross-examination of the witness; the document was not relevant to any issue other than impeaching the witness' testimony; the contract went to the essential issue of whether the witness was performing bargaining unit work on the date of

application – Finding the rule applied, the Board held that serious prejudice would be caused by allowing the contract to be entered into evidence: the applicant would be allowed to split its case and the already two-year-old application would be further lengthened, thereby compromising the efficiency of the Board's certification process – In contrast, the prejudice suffered by the applicant was minimal – Although not determinative of the matter, the Board also noted that the applicant had failed to follow Rule 8.3 of the Board's Rules of Procedure – Having regard to the purpose of the Act and labour relations principles, the Board confirmed its original ruling that the evidence was inadmissible – Reconsideration denied; matter continues

JOHN BODDY DEVELOPMENTS LTD.; RE LIUNA LOCAL 183 ..... (May/June) 360

Status – Certification – Practice and Procedure – In order to determine status disputes about whether certain employees were employed "in, at and out of" a certain address, the Board directed particularized "will say" statements and at the hearing into the matter asked additional questions to clarify some of the statements made – The Board found that where employees work at or out of more than one site, for the purposes of determining whether they fall within a bargaining unit encompassing only one of those sites the Board considers to which site the employee has the greatest attachment – While the employees at issue sometimes worked "out of" the specific address, they were not primarily attached to this address – Matter continues

RAINBOW CONCRETE INDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793..... (May/June) 409

Stay – Construction Industry – Judicial Review – Public Sector Labour Relations Transition Act – Related Employer – Sale of Business – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – Subsequent to its related employer decision the Board scheduled a grievance, alleging a failure to comply with the provincial agreement, involving some of the parties, which had been adjourned pending the related employer application – The School Board brought an application for a stay to Divisional Court pending the hearing of its judicial review application on the finding of relatedness – The Court dismissed the motion noting that the parties had secured an early date for the judicial review application, and while commenting that there "may be some benefit gained by the parties" if the grievance was adjourned pending the outcome of the judicial review application, the Court left that issue to be determined by the Board, given the slow pace with which the litigation had been advanced – Motion for stay dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773 et al..... (May/June) 473

Strike – Duty to Bargain in Good Faith – Interference in Trade Union – Unfair Labour Practice – The union argued that the employer had breached its duty to bargain in good faith and had interfered in the administration of the union – In the context of a plant closure following a strike, the employer had proposed that employees who were at work when the strike commenced were not entitled to severance pay or, alternatively, their entitlement should be capped at $11,000 – The Board found that because of the imbalance of bargaining power in this relationship (the union had lost the strike and was negotiating a back-to-work and subsequent closure agreement, so the employer clearly

had the upper hand), the employer's proposal to cap severance entitlements could not be taken to impasse – In the context of a plant closure, with the union in a significantly weakened position, minimum employment standards take on increased importance for employees – To conclude that the employer could take the proposal of the cap to impasse would render the employees' statutory rights illusory – Application granted in part

FLEET INDUSTRIES, MAGELLAN AEROSPACE LIMITED; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, FRONTIER LODGE 171 AND RIVERSIDE LODGE 939 ..... (Jan./Feb.) 45

Strike – Intimidation and Coercion – Unfair Labour Practice – Two applications were filed pursuant to section 96 of the Act arising from efforts by the CAEA to pressure Blue Man Toronto (BMT) into signing collective agreements with the unions – As part of its campaign, the CAEA issued a directive that its members refrain from performing or auditioning for BMT – Two members of the CAEA on honourable withdrawal status accepted employment with BMT and were subsequently expelled from membership – BMT and these two employees alleged in their applications that CAEA and the other named respondents pressured the employees to quit their employment with BMT, constituting unlawful intimidation and coercion – The employees claimed further that the responding parties called, authorized and/or attempted to cause an unlawful strike by pressuring the employees to quit their employment with BMT, and also, that CAEA violated section 85 by expelling them for refusing to engage in an unlawful strike – The Board dismissed the claim under section 76 on the grounds that the Act does not provide for nor protect a right of an employee to work for an employer contrary to the rules and/or directives of their union while retaining membership in the union at the same time – The Board also declined to grant relief under ss. 81 or 83 as the necessary elements of a "strike" as defined under section 1(1) of the Act were not made out – Finally, with respect to the alleged breach of section 85, the Board held that the directive by the CAEA and the subsequent expulsion from membership of the two employees did not disclose any violation of the Act, as the internal administration of a union constitution does not fall under ss. 81, 83 and 85 of the Act – Applications dismissed

BLUE MAN TORONTO, LLC ; RE CANADIAN ACTORS' EQUITY ASSOCIATION; KEN BURNS AND SUSAN WALLACE ..... (Jan./Feb.) 4

Strike – Lock-Out – Reconsideration – The ATU alleged the TTC had illegally locked out its employees, and also sought reconsideration of the earlier cease and desist order (the Whitaker decision) – The Board held that no lock-out was taking place, and stated that the parties could have had their differences considered through the grievance and arbitration process – The Board also found that the illegal strike was continuing – The Board stated that even if it were to find that the union had not received notice of the earlier hearing, it was not appropriate to vary the Board's order – The union had full opportunity to make the submissions it would have been able to make earlier - Lock-out application dismissed; reconsideration of strike application denied

TORONTO TRANSIT COMMISSION ; RE AMALGAMATED TRANSIT UNION, LOCAL 113, MIKE SMITH et al ..... (May/June) 439

Strike – Practice and Procedure – The TTC brought an application for a declaration that its employees were about to engage in an illegal strike at the start-up of the morning shift – The Board provided notice to the union and counsel who normally acted for the union of a 5:30 a.m. hearing by conference call to deal with the application, leaving telephone messages and sending a facsimile to the union's office – The Board held that the union

had been served with the application and had received notice of the hearing – The Board ordered the employees to cease and desist from any further engagement in the unlawful strike

TORONTO TRANSIT COMMISSION ; RE AMALGAMATED TRANSIT UNION, LOCAL 113, MIKE SMITH et al ..... (May/June) 439

Termination – Bargaining Rights – Construction Industry – Evidence – Practice and Procedure – When the IBEW objected to the evidence of employee wishes supplied by the applicant and the Board determined that only photocopies had been filed with the application, the applicant was able to produce the original document to overcome the objection since there were no other defects in the application materials – The Board held that one copy of the employees' wishes was adequate for multiple applications: it is not necessary for employees signing an expression of their wishes to stipulate the Board Area or sector of the construction industry in which they are working in order to make clear that they do not want to be represented any longer by their bargaining agent – The wording of the document providing evidence of the employees' wishes must be sufficient to show the intention – Matter continues

JLY ELECTRIC LTD. ; RE ERNIE PICKARD ; IBEW, LOCAL 105; IBEW CONSTRUCTION COUNCIL OF ONTARIO ..... (Sept./Oct.) 710

Termination – Bargaining Rights – Construction Industry – Voluntary Recognition – In this application by the Painters to terminate the Plasterers' bargaining rights under s. 66, Syntex was bound to the Painters' Provincial Collective Agreement (which covered, among others, drywall tapers), when it obtained a subcontract from a general contractor bound to a collective agreement with the Plasterers' requiring that plasterers' work only be subcontracted to companies in contractual relations with that union – After commencing work and employing drywall tapers, Syntex entered into a voluntary recognition agreement with the Plasterers – The Board held that when there are actual persons employed in the bargaining unit, the union must demonstrate that it was entitled to represent those actual employees – Although the Plasterers' could not show they were entitled to represent the employees in the bargaining unit on the applicable date, the Board noted it still had discretion under s. 66 to decide whether to terminate the bargaining rights – The Board, following *Penegal Trim*, found nothing to override the fundamental right of the employees of this particular employer to freely select their own union – The Board declared that the Plasterers' were not, at the time the voluntary recognition agreement was entered into, entitled to represent employees in the bargaining unit set out therein, and that the Plasterers' bargaining rights obtained by voluntary recognition with Syntex were terminated as of the date of the Board's oral decision – Application granted

R.P. SYNTEX WALLS SYSTEMS; RE IUPAT LOCAL 1891; RE OPERATIVE PLASTERERS' AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA LOCAL 124 ..... (Nov./Dec.) 823

Termination – Bargaining Rights – Employer Initiation – In this application for termination of bargaining rights, the union alleged that the employer had involved itself in the campaign, contrary to s. 63(16) of the Act – The union contended that: (1) the employer had knowledge of the application before it was delivered; (2) an employee in the human resources department made telephone calls to bargaining unit members to encourage their participation in the representation vote; and (3) the employer provided information to the applicant to enable him to send campaign literature to bargaining unit members – During

the hearing, the employer conceded the first and third allegations, but submitted that neither constituted a violation of the Act – The Board considered all three allegations, holding that the employer's prior knowledge of the application was obtained innocently and the evidence of the employer's provision of employee information to the applicant was circumstantial and not compelling – With respect to the employee's phone calls to bargaining unit members, the Board could not conclude there was any evidence of improper comments – The union's objections were dismissed – Following the counting of the ballots, the termination application was successful

ONTARIO LOTTERY AND GAMING CORPORATION C.O.B. AS THE SLOTS AT FORT ERIE RACETRACK ; RE MICHAEL MCLELLAN ; RE OPSEU LOCAL 278 ..... (May/June) 399

Termination – Employment Standards – This was an employee application under the *ESA, 2000* for review of a refusal to issue an Order to Pay termination and severance pay – After suffering a workplace injury, the employee did not work again for the responding party past February 28, 2003, although he continued to remain employed – On February 1, 2005, the responding party mailed him a pre-printed pension form replete with references to termination, both within the heading and throughout the various sections – The Board found that the most probable interpretation of the pension form was that the responding party unilaterally severed the applicant's employment consistent with the definition of "severance" under section 63(1)(a) – Whether or not it intended to sever the applicant's employment was immaterial – The Board also held that, in light of section 9(2)(b) of *O. Reg. 288/01*, the doctrine of frustration did not apply in this case to prevent the applicant's entitlement to severance – The onus was on the party raising the defence of frustration to demonstrate that the applicant's severance was not prohibited by the *Human Rights Code* – To succeed, the party was required to demonstrate that it had accommodated the applicant's injury to the point of undue hardship – This threshold had not been reached in this case – Since the applicant's severance pay entitlement comprised the monetary limit set by section 103(4), the Board concluded that it was unnecessary to determine whether the applicant was also entitled to termination pay – Application granted

RAINBOW CONCRETE INDUSTRIES LTD. ; RE MARC BARRETTE AND DIRECTOR OF EMPLOYMENT STANDARDS ..... (Mar./Apr.) 279

Timeliness – Bargaining Unit – Certification – Construction Industry – Membership Evidence – After the two-day time limit under 128.1(3) had lapsed City Core filed a revised list that included three additional names – The union challenged the inclusion of two of these individuals, arguing City Core was statutorily prohibited from adding names after the two day time limit under 128.1(3) had lapsed – In regard to the third employee, the union did not challenge this employee's inclusion on the list as both sides had agreed he was to be included during a subsequent Regional Certification meeting – The Board found that City Core was prohibited from adding names to its list of employees after the expiry of the two day statutory period – The Board, however, permitted the inclusion of the third employee as neither party had challenged City Core's addition of this employee's name during the Regional Certification meeting and the Union would have been permitted to add the third employee to the list if City Core had not already done so – Matter continues

CITY CORE MECHANICAL LTD.; RE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 46 ..... (Sept./Oct.) 673

Timeliness – Certification – The Labourers applied to represent non-construction employees of Belanger – The Operating Engineers ("Local 793") asserted that their all-employee collective agreement encompassed the employees in question, so the application was untimely – The work related to highway maintenance contracts Belanger entered into with the City of Sudbury and the Ministry of Transportation – Belanger used a combination of Local 793 members and other individuals to perform the work, and Local 793 had never taken steps to enforce the collective agreement it claimed related to the highway maintenance work – The Board held that a collective agreement that requires an employer to pay its employees in a particular way when they are performing work outside the scope of the agreement does not extend the scope of the agreement to cover that work – Timeliness argument dismissed, matter continues

BELANGER CONSTRUCTION (1981) INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE IUOE, LOCAL 793; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 2486.....(Nov./Dec.) 776

Timeliness – Certification – Collective Agreement – Three applications for certification were set down for hearing to determine whether any collective agreements existed between any of the applicants and Comstock, the responding party, at the intervenor's construction project – Two of the applicants (Millwrights and Carpenters) conceded their applications were untimely – The Labourers argued there was no collective agreement bar to their application – Comstock claimed it was bound by the collective agreement between the Labourers and the intervenor, Brighton Beach Power, because Comstock had signed a document (the Brighton Beach agreement) acknowledging that it had received a copy of the collective agreement between Brighton and the Labourers – The Board held that the agreement between the Labourers and Brighton could not bind the Labourers to Comstock, without notice to the Labourers of an agreement to be bound or acceptance by the Labourers that Comstock was bound – Furthermore, just because Comstock was abiding by the terms and conditions of the collective agreement did not mean it was bound by it where Comstock was not a signatory to that agreement – There was no collective agreement bar to the application for certification by the Labourers – Matter continues

COMSTOCK CANADA LTD. ; RE MILLWRIGHT REGIONAL COUNCIL OF ONTARIO; RE BRIGHTON BEACH POWER LTD..... (July/Aug.) 501

Timeliness – Certification – Reconsideration – Unfair Labour Practice – The union sought reconsideration of the decision dismissing the application for certification - Although the union indicated on the certification worksheet that it intended to file an unfair labour practice about the employer's conduct, the Board did not receive any representations in the five-day post-vote period provided for in its decision ordering the vote – The Union argued that it had difficulty obtaining timely statements from employees because of the employer's impugned conduct and it filed its s. 96 application as soon as it had gathered those statements (one week after the Board's decision dismissing the certification application) – The Board found that the union had sufficient knowledge of the allegations at the time of the vote or immediately thereafter to make appropriate representations – Request for reconsideration denied – Unfair labour practice complaint continues

THE CORPORATION OF THE COUNTY OF SIMCOE (GEORGIAN MANOR); RE SEIU LOCAL 1.on .....(Sept./Oct.) 751

Timeliness – Health and Safety – The applicant sought to appeal an Inspector's Order pursuant to section 61 of the Occupational Health and Safety Act – On July 18, 2006 the Inspector

prepared an Investigation Report and six days later the applicant wrote a letter to the Acting Program Manager of the Ministry of Labour raising concerns with the Report – The Acting Manager reviewed the Report and advised the applicant on August 4, 2006 that the employer had taken all reasonable precautions, and five days later provided the applicant with a written description of the appeals process pursuant to section 61 of the Act – The applicant claimed that the Acting Manager's letter dated August 4, 2006 constituted a decision and sought an appeal of it on August 29, 2006 – The Board found that the letter did not convey a decision or communicate the results of an investigation that was conducted under the Act – The Board determined that the application was not filed within 30 days of the Inspector's decision dated July 18, 2006 – The Board confirmed that it does not have the authority to extend the statutory time limit for filing an appeal under section 61(1) – Appeal Dismissed

AVENUE II COMMUNITY PROGRAM SERVICES (THUNDER BAY); RE SHARON FONTAINE; RE DOUGLAS CETTINA, INSPECTOR .....(Nov./Dec.) 761

Timeliness – Health and Safety – Reconsideration – The applicant sought reconsideration of the Board's decision dismissing its appeal for having filed it beyond the statutory 30-day time limit found in s. 61(1) of the *Occupational Health and Safety Act* – The applicant argued the Board has jurisdiction to "deviate, abridge and extend" the time period set out in the Act if the exercise of discretion relates to procedural requirements – The applicant sought to rely on s. 123 of the *Labour Relations Act, 1995* ("technical irregularity") and s. 4.5 of the *Statutory Powers Procedure Act* ("refusal to process documents") – The Board held that it could not import a provision of the LRA when the OHSA set out a complete code for appeals – Similarly, the Board held that s. 4.5 of the SPPA could not be relied on because the Board had in fact processed the appellant's documents and had dismissed the appeal for having been filed beyond the statutory time limit – Reconsideration denied

LAC DES ILES MINE LTD.; RE USWA; AND INSPECTOR ANDRES JOHANNESSON.....(Sept./Oct.) 715

Timeliness – Health and Safety – Reconsideration – The Board was asked to reconsider its decision dismissing an application appealing an inspector's decision not to make an Order, where the appeal was made beyond thirty days from the inspector's visit to the job site and his refusal to issue an Order, but within 30 days of having received a copy of the Premise/Project Form providing the information that no orders were issued – The Board found that the OHSA only requires a contravention order under s. 57 to be confirmed in writing and nothing requires an inspector to confirm in writing his or her refusal to issue an order – In the absence of a posting of an order the Board found the union reasonably ought to have known that the inspector refused to issue an order – Further the fact that the inspector subsequently faxed the Premise/Project Form to the union did not give rise to a new period of time in which the union could file its appeal – The provision of the Premise/Project Form at a later date does not mean that the inspector's decision occurred at some later time, nor does it provide the union with a new 30-day time period – The time limit begins from the day of the refusal to issue an order – Request for reconsideration dismissed

LASER ELECTRIC AND DIRECT ENERGY AND WENDY GOBEIL, INSPECTOR; RE IBEW, LOCAL 586. ..... (July/Aug.) 551

Trade Union – Alteration of Jurisdiction – Construction Industry – Damages – Interim Relief – Practice and Procedure – Unfair Labour Practice – The Local complained that the

International, without just cause and contrary to sections 147 and 149, altered the jurisdiction of the Local and placed it under supervision – The Local also complained that the International represented it in a manner that was arbitrary, discriminatory, or in bad faith – The Board determined that the matter required an expeditious resolution and that this could only be achieved through a consultation – In 2002, as the International restructured into Regional Councils, the Local voluntarily affiliated with GORC (which did not permit Locals to employ persons directly) and remained bound by the International's constitution – In 2005 a dispute arose between the Local and International when three Local officers either resigned or were dismissed from employment with GORC – The Local resolved to withdraw from GORC and remain autonomous; the International responded with an audit, a hearing and the placement of the Local under supervision – The Board first found that there was no alteration of jurisdiction by the International: the International in attempting to keep the Local in the GORC, was doing nothing other than giving effect to the jurisdiction voluntarily assumed by the Local – The Board next considered the four factors set out in s. 147(3) for determining whether the International had cause and found in favour of the International having had cause – Further the Board found the International had just cause to assume supervision of the Local – The Local had no legitimate justification for its secession from the International at the outset and the interests of the Local, as distinct from the interests of the individuals, were not impaired or put in jeopardy by the supervision or the process leading to the supervision – Applications dismissed, subject to the issue of whether damages were payable

GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL & ALLIED WORKERS; RE CJA, LOCAL UNION 93 .....(Jan./Feb) 52

Trade Union – Certification – Employer Support – Representation Vote – In this application for certification the Board considered whether section 15 of the Act was contravened, that is whether the employer provided financial or other support to the applicant – The Board concluded that the Association was precluded from becoming certified for the following reasons: the Association's sole source of start-up and ongoing operating funding was the employer; no dues deductions were authorized; it was not relevant whether the funding was provided directly or indirectly by the employer as it was still financial support; the employer provided free office space, a significant amount of relief time, and paid for all arbitration proceedings; and the Association's membership was limited to non-union employees holding permanent positions thus giving management control of membership through its hiring decisions – All of this amounted to improper employer support – Application dismissed

UNIVERSITÉ D'OTTAWA RE : ASSOCIATION DES EMPLOYE(E)S DE L'UNIVERSITE D'OTTAWA [AEUO]. ..... (May/June) 444

Trusteeship – Conflict of Interest – Standing – In the continuing battle between LIUNA and Local 183, the trustee asked the Board to declare that 183's Jurisdictional Committee had no standing to continue in this litigation, and that 183's lawyers were in a conflict of interest because of their access to and knowledge of confidential information relating to the trusteeship – Given that the Committee was extinguished when the trusteeship was imposed, and that the trustee purported to dissolve the Committee in any event, the Board declared that the Committee was no longer an entity capable of continuing to participate in these matters; the two remaining members of the Committee were added as individual parties to this litigation – On the conflict issue, the Board held that the law firm possessed no confidential knowledge outside of what it had learned from its clients to support the litigation – Since there has been no change in positions, and no individual lawyers

moving from one side of the litigation to the other, the Board found no conflict and allowed the firm to continue to represent its clients

UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; RE LIUNA ET AL.....(Nov./Dec.) 848

Unfair Labour Practice – Adjournment – Certification – Construction Industry – Practice and Procedure – Related Employer – Sale of a Business – The responding parties sought an adjournment of these proceedings because of a pending criminal trial involving the employer's representative and an employee – The responding parties argued that because of an Undertaking Given to a Peace Officer, the employer's representative was prohibited from "going to anyplace" the employee was to be (he was a potential witness in these proceedings) – Once the Board established that the employee was not in attendance, it ordered the employer's representative to appear at the hearing – The Board refused to adjourn its proceedings: first, there was no consent to the request; second, the Board gives priority to serious allegations of unfair labour practices; third, the personal concerns of the employer's representative do not attract the same level of concern as do the interests of the parties; fourth, the Board is not in a position to remedy conflicts of loyalties a person may have (between self-interest and the interests of the employer) – Matters referred to Registrar to set hearing dates

NORTHLAND PROPERTIES CORPORATION ; VANDALAY CONTRACTING INC.; RE LIUNA LOCAL 506.....(Mar./Apr.) 245

Unfair Labour Practice – Alteration of Jurisdiction – Construction Industry – Damages – Interim Relief – Practice and Procedure – Trade Union – The Local complained that the International, without just cause and contrary to sections 147 and 149, altered the jurisdiction of the Local and placed it under supervision – The Local also complained that the International represented it in a manner that was arbitrary, discriminatory, or in bad faith – The Board determined that the matter required an expeditious resolution and that this could only be achieved through a consultation – In 2002, as the International restructured into Regional Councils, the Local voluntarily affiliated with GORC (which did not permit Locals to employ persons directly) and remained bound by the International's constitution – In 2005 a dispute arose between the Local and International when three Local officers either resigned or were dismissed from employment with GORC – The Local resolved to withdraw from GORC and remain autonomous; the International responded with an audit, a hearing and the placement of the Local under supervision – The Board first found that there was no alteration of jurisdiction by the International: the International in attempting to keep the Local in the GORC, was doing nothing other than giving effect to the jurisdiction voluntarily assumed by the Local – The Board next considered the four factors set out in s. 147(3) for determining whether the International had cause and found in favour of the International having had cause – Further the Board found the International had just cause to assume supervision of the Local – The Local had no legitimate justification for its secession from the International at the outset and the interests of the Local, as distinct from the interests of the individuals, were not impaired or put in jeopardy by the supervision or the process leading to the supervision – Applications dismissed, subject to the issue of whether damages were payable

GREATER ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL & ALLIED WORKERS; RE CJA, LOCAL UNION 93 .....(Jan./Feb.) 52

Unfair Labour Practice – Bargaining Rights – Discharge for Union Activity – Interim Relief –

Remedies – The union sought interim reinstatement pursuant to section 98 of an employee who, the union asserted, was an inside union organizer and was discharged for her organizing activity – The employer asserted that the employee was terminated due to her own misconduct (using profanity on the production floor) in accordance with its policies and procedures and without anti-union animus – The Board was satisfied that interim relief was necessary to prevent irreparable harm or to achieve other significant labour relations objectives, as her termination, as a supporter of the union and key inside organizer, may have a detrimental effect on the union's organizing drive – The Board was not concerned that the reinstatement of the employee could put the business at risk for the following reasons: the company did not immediately remove the employee from the workplace when it learned of the transgression, although it could have under its policy; the employee swore 4-5 times in four years, but only one time was it on the production floor and the company concedes that one instance of swearing on the production floor does not always result in termination; and lastly, there was no suggestion that there had ever been a client complaint arising out of the employee's use of profanity – In regards to s. 98(3), where there are numerous and significant factual disputes, the Board stated that it must assess the two stories and ask itself whether it appears the conduct of the employer is (applying the Board's experience) that of an employer which is engaged in a process free of anti-union animus – The Board held that it did not appear that the employer's decision to discharge the employee was unrelated to her exercise of rights under the Act and reinstatement is therefore an appropriate remedy – Reinstatement and posting ordered

SITEL CUSTOMER CARE INC.; RE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) ..... (July/Aug.) 625

Unfair Labour Practice – Bargaining Rights – Related Employer – Sale of a Business – Five applicant unions sought declarations that the City of Toronto and Toronto Community Housing Corporation ("TCHC") were either a single employer pursuant to s. 1(4) of the Act, or TCHC was a successor to the City – CUPE Local 416 also complained that the employers had committed an unfair labour practice by attempting to defeat or interfere with the union's bargaining rights – The TCHC subsequently filed an application for a declaration that there had been a sale of a business from the City to TCHC – On February 21, 2002, the Board declared TCHC to be a successor to the City - By "bottom line" decision dated March 3, 2005, the Board dismissed the s. 1(4) applications and the unfair labour practice complaint – The Board provides a detailed history of the evolution of social housing in Toronto, the culmination of which was the creation of the TCHC, an arm's length entity responsible for the governance of public housing (with the City as sole shareholder) – TCHC employees, some of whom previously enjoyed membership in city-wide bargaining units, were now in stand-alone bargaining units separate from other city employees – The unions argued that the change in representation would undermine their bargaining strength, facilitate contracting out, and reduce mobility rights – The Board found that in the five years subsequent to the creation of the TCHC, the City had not been involved in any of the TCHC's labour relations, nor had the Board seen any evidence of contracting out – Despite production of voluminous materials by the City and TCHC, there was no evidence of any anti-union animus – The Board found the creation of the new housing model was based solely on legitimate business considerations, and stated that the purpose of s. 1(4) is to preserve bargaining rights but not any particular bargaining structure – Applications dismissed

CITY OF TORONTO AND TORONTO COMMUNITY HOUSING CORPORATION; RE IBEW, LOCAL 353; UNITED ASSOCIATION OF JOURNEYMEN AND

APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 46; CARPENTERS AND ALLIED WORKERS LOCAL 27; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA ; TORONTO CIVIC EMPLOYEES' UNION, LOCAL 416; CUPE; OPSEU ..... (Sept./Oct.) 681

Unfair Labour Practice – Certification – Construction Industry – Practice and Procedure –In response to the union's application for certification, accompanied by a request for relief under section 11, the employer provided a materially significant 8.1 notice – The union asked that no representation vote be held (notwithstanding a finding of not less than forty percent of the individuals in the bargaining unit proposed in the application) until its s. 11 relief was determined, however the Board found that s. 8(2) requires that a representation vote be taken – Finally, although the employer consented to the counting of the ballots, given that the union had sought a delay in the representation vote, the Board was uncertain whether the union consented to the ballots being counted and ordered the ballot box sealed until the Board so orders or the parties agree – Matter continues

EAST ELGIN CONCRETE FORMING LIMITED ; RE LIUNA LOCAL 1059. ..... (Sept./Oct.) 706

Unfair Labour Practice – Certification – Intimidation and Coercion – Standing – The employer filed an unfair labour practice complaint, alleging that the responding party (CAW) intimidated its employees into voting in favour of the CAW during the representation vote – The applicant requested that the CAW's certification application be dismissed or that the Board order a second representation vote – The CAW argued that the applicant did not have standing to bring the application; in the alternative that it had waived its right to do so; and finally that no *prima facie* case had been pled in respect of intimidation or coercion – With respect to the first issue, the Board found that the applicant had standing to bring its s. 96 application – The applicant was a party to the certification application, and therefore had a right to make submissions to the Board – On the second issue, the Board held that the applicant did not waive its right to bring a complaint – A waiver of the right to request another representation vote or of the right to request that the Board dismiss the application could only be triggered by an agreement between the two parties that the certification application be dismissed or that a final certificate be issued – Because there was no agreement, there was no waiver – On the final issue, the Board found that there were insufficient facts pled by the applicant to dismiss the certification application or to order a second representation vote – The Board noted that voters are reasonable and possessed of critical faculties, which enable them to recognize election propaganda for what it is – Further, the Board held that a reasonable voter would understand that the secrecy of the ballot boxes assures the integrity of the expression of voters' wishes – Even if the employer's allegations of intimidation and coercion were proven, the actions of the CAW did not result in the employees being deprived of the ability to express their true wishes – Application for certification granted – Section 96 application remitted back to the parties

MEWS CHEVROLET LTD.; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) ..... (Mar./Apr.) 187

Unfair Labour Practice – Certification – Reconsideration – Timeliness –The union sought reconsideration of the decision dismissing the application for certification - Although the union indicated on the certification worksheet that it intended to file an unfair labour practice about the employer's conduct, the Board did not receive any representations in

the five-day post-vote period provided for in its decision ordering the vote – The Union argued that it had difficulty obtaining timely statements from employees because of the employer's impugned conduct and it filed its s. 96 application as soon as it had gathered those statements (one week after the Board's decision dismissing the certification application) – The Board found that the union had sufficient knowledge of the allegations at the time of the vote or immediately thereafter to make appropriate representations – Request for reconsideration denied – Unfair labour practice complaint continues

THE CORPORATION OF THE COUNTY OF SIMCOE (GEORGIAN MANOR); RE SEIU LOCAL 1.on ..... (Sept./Oct.) 751

Unfair Labour Practice – Certification Where Act Contravened – Construction Industry – The certification and the ULP applications both indicated that the union might seek relief to be certified under section 11 of the Act – The employer made a motion on the first day of hearing to have the Board "strike" the reference to section 11 on both applications, arguing that once a trade union has made an application under section 128.1 it cannot "convert" the application to one brought pursuant to section 8 of the Act – The Board found it does have the power, pursuant to Rule 40.5, to permit an applicant to amend its application – The applicant must provide the Board with a reason to exercise its discretion – Whether the Board will permit a party to amend its application is a question of prejudice to other parties in the case and must be determined at the time the request is made – As the applicant was not seeking such an amendment at the time, the decision dealt only with whether an amendment to an application is available – Matter continues

L & L PAINTING AND DECORATING LTD.; RE THE INTERNATIONAL UNIONS OF PAINTERS AND ALLIED TRADES, LOCAL 557 ..... (May/June) 385

Unfair Labour Practice – Change in Working Conditions – Interference with Trade Unions – Lock-Out – An application was filed by the union pursuant to section 96, alleging that the responding party had violated sections 70, 72, 73, 76, 83, and 86 of the Act – The collective agreement between the two parties expired on August 31, 2005, and they were in a strike/lock-out position on December 5, 2005 – The responding party did not lock-out its employees – Rather, commencing December 5, it began to pay them in accordance with the new terms and conditions of employment that the responding party had unilaterally implemented – The applicant argued that the employer could not impose terms and conditions of employment until after it had locked-out its employees, and that any implementation of terms and conditions of employment prior to a lock-out constituted direct bargaining with employees contrary to section 73 – The responding party relied on section 86, which in its view gave it the right to change the terms and conditions of employment on the date at which the lock-out period commenced, even if no lock-out actually occurred – The Board agreed with the responding party, holding that once the parties are in a strike or lock-out position, section 86 does not prevent an employer from altering the terms and conditions of employment without the union's consent – Since the responding party altered the terms and conditions of employment only after the lock-out period had commenced, it did not violate section 86 – The Board also held there was no breach of section 73, finding that "altering" working conditions is not the same as "bargaining" directly with bargaining unit employees – The facts also did not disclose a breach of sections 70, 72, or 76 – As for section 83, since the parties were in a strike/lock-out position, there could be no violation – Application dismissed

NEENAH PAPER COMPANY OF CANADA; RE UNITED STEELWORKERS 1-2693 ..... (Mar./Apr.) 224

Unfair Labour Practice – Consent to Prosecute – Contempt – The union sought a ruling from the Board that the employer had failed to comply with certain directions issued in the unfair labour practice decision, as well as the Board's consent to initiate a prosecution of the employer for such failure – The Board found that the employer refused to recognize the trade union as the bargaining agent of its employees and failed to acknowledge the legitimacy of the collective bargaining and arbitration process – The employer's continued refusal to provide information to the union to enable it to quantify its damages caused the Board to state a case for contempt and consent to the launching of the prosecution – The Board declined to award legal costs against the employer – Application granted

1229026 ONTARIO INC. C.O.B. AS PLACE MONT ROC; RE UNITED STEELWORKERS, LOCAL 1-1000 ..... (May/June) 307

Unfair Labour Practice – Constitutional Law – Interim Relief – Intervenor – Judicial Review – Reference – The Board considered whether certain provisions of the *Labour Relations Act, 1995* are of no force and effect by reason of either the enactment of a First Nation *Labour Code*, aboriginal or treaty rights, or the First Nation's inherent right to self-government – The Board addressed the concept of aboriginal rights and considered the test to be applied in determining whether a right has been established – Citing *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – Constitutional question answered in the negative – Employer is obliged to bargain and the Minister may appoint a conciliator – On judicial review, the Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the First Nation had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the court held that the Board had the statutory authority to conduct the proceedings as it did – Application for judicial review dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB ..... (May/June) 450

Unfair Labour Practice – Construction Industry – Duty to Bargain in Good Faith – Standing – To secure itself a subcontractor to install cedar shingles, SLR signed a collective agreement with the Carpenters, after having been told by the subcontractor that the Residential Roofing Agreement was standard across the province and included a letter of understanding specifying wage rates for cedar shingling – After the subcontractor abandoned its contract with SLR, and SLR was forced to pay another entity higher rates to complete the work, SLR complained that both the subcontractor and the Carpenters had violated sections 17 and 70 of the Act, because the agreement SLR was given to sign was not in fact standard across the province – The Board held that an employer has no standing to bring a complaint under s. 70, so that element of the application was dismissed – With respect to the duty to bargain in good faith, the Board found that the

Carpenters did not hold bargaining rights for the employees at the time that bargaining with SLR took place, so no such duty arose in the circumstances – Application dismissed

S.L.R. ROOFING AND SHEET METAL; RE CARPENTERS AND ALLIED WORKERS LOCAL 27, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; RE ROBERT SHEWELL; RE 6221220 CANADA INC. O/A JIM'S ROOFING AND JIM LEBLANC .....(Nov./Dec.) 832

Unfair Labour Practice – Discharge – Discharge for Union Activity – Interim Relief – Remedies – Two union organizers were terminated in the midst of an organizing campaign and the union asked the Board to reinstate them on an interim basis pending resolution of the complaint – The employer argued it had terminated the two employees for cause, based on allegations of absenteeism and various performance and attitude issues – Neither of the employees had ever been disciplined nor had they received complaints from the employer prior to their terminations – The employer was aware that the two individuals were union supporters – The employees were notified about their terminations through email messages – The Board reinstated the two individuals pending the resolution of the unfair labour practice complaint – In doing so, the Board acknowledged that the period of time between an application for certification and the ultimate disposition is a particularly difficult one for a union in terms of maintaining the confidence of its supporters – The Board found the union would suffer irreparable harm in terms of erosion of support if interim relief of reinstatement was not granted and that the balance of harm favoured granting the order – Interim reinstatement ordered

AXA ELECTRIC INC.; RE IBEW LOCAL 353 .....(Nov./Dec.) 766

Unfair Labour Practice – Discharge – Interim Relief – Remedies – OLGC discharged a part-time Security Officer, who was a supporter of the union's organizing campaign, as a result of a pattern of unpredictable, volatile and disruptive behaviour – The parties agreed that the events occurred during an organizing campaign and there was a serious issue to be tried – On balance of harm the Board found that the interim reinstatement of the security officer would expose OLGC to unreasonable risk since the security officer may not be able to perform his duties safely and appropriately and he could be disruptive in the workplace – Furthermore since the union's organizing drive commenced 18 months prior to the security officer's discharge, the application was filed over two weeks after the discharge, and there were no substantial allegations that he was a key inside organizer, the Board found there was not significant harm to PSAC – Accordingly, the Board did not find the balance of harm favoured granting the interim application – Application for interim relief dismissed

ONTARIO LOTTERY AND GAMING CORPORATION; RE PUBLIC SERVICE ALLIANCE OF CANADA .....(Jan./Feb.) 95

Unfair Labour Practice – Discharge – Interim Relief – The union sought interim reinstatement of its key inside organizer, McDonell, who was discharged during an organizing drive – The employer claimed it knew nothing of the organizing drive and that McDonell was fired for the rude and belligerent way he complained about the "swing shift system" – The Board found an appearance of a causal relationship between McDonell's termination and his exercise of rights under the Act because of the following elements: he was a 6 year employee with no discipline record; he had complained before about the "swing shift system" without discipline; other employees complained, even rudely, and were not disciplined; the organizing drive had lasted a few weeks involving some 30 employees and hence it was likely the employer was aware of it; the ostensible reason for the

termination was closely related to the lawful activities of discussing working terms and conditions – The other criteria set out in s. 98.1 were met and the Board ordered interim reinstatement, among other orders – Relief granted

CORNWALL GRAVEL CO. LTD.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527 ..... (May/June) 332

Unfair Labour Practice – Discharge – Interim Relief – Both the unfair labour practices complaint and the application for interim relief sought the reinstatement of an employee, who, the IBEW argued, was terminated because of assisting IBEW in an active organizing drive of K2 employees – The Board found the employer's action took place during an organizing campaign and that the pending application raised a serious issue – Although the Board had serious concerns with whether IBEW could establish irreparable harm on the basis of chill to other employees, the Board did find that the union would suffer irreparable harm if the employee, as an insider organizer, was not reinstated – However the Board found that it appeared that the lay-off, suspension or discharge of the employee was unrelated to the exercise of rights under the Act for the following reasons: the employee had only worked for K2 for two hours before leaving for personal reasons; K2's reasons for not rehiring appeared reasonable (a practice for new employees precluded his return one week, and a mistaken belief about a contravention of the *TQAA*, precluded his return the next) – Additionally, IBEW's material attempting to link the non-return to the exercise of rights was problematic – Accordingly, section 98(3) precluded an order of reinstatement – Interim Application dismissed

K2 ELECTRICAL CONTRACTING LTD.; RE IBEW, LOCAL 105 ..... (May/June) 375

Unfair Labour Practice – Duty to Bargain in Good Faith – Interference in Trade Union – Strike – The union argued that the employer had breached its duty to bargain in good faith and had interfered in the administration of the union – In the context of a plant closure following a strike, the employer had proposed that employees who were at work when the strike commenced were not entitled to severance pay or, alternatively, their entitlement should be capped at $11,000 – The Board found that because of the imbalance of bargaining power in this relationship (the union had lost the strike and was negotiating a back-to-work and subsequent closure agreement, so the employer clearly had the upper hand), the employer's proposal to cap severance entitlements could not be taken to impasse – In the context of a plant closure, with the union in a significantly weakened position, minimum employment standards take on increased importance for employees – To conclude that the employer could take the proposal of the cap to impasse would render the employees' statutory rights illusory – Application granted in part

FLEET INDUSTRIES, MAGELLAN AEROSPACE LIMITED; RE INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, FRONTIER LODGE 171 AND RIVERSIDE LODGE 939.....(Jan./Feb.) 45

Unfair Labour Practice – Duty of Fair Referral – Three members of IUBAC Local 20 complained that BACU, Local 2 (the union administering the relevant collective agreement) violated section 75 of the Act when it refused to investigate or take any action against contractors who encroached on Local 20's jurisdiction with their own crews rather than availing themselves of the hiring hall – BACU and IUBAC were vying for membership at this time, but the Board found no evidence that BACU knew the individuals might be IUBAC supporters – The Board confirmed that a union may take its institutional interests into account when deciding whether to pursue a grievance or seek to enforce a collective agreement – In any event, the complainants were unable to

establish that they would have been dispatched to the jobs even if the collective agreement had been enforced – Application dismissed

BRICK AND ALLIED CRAFT UNION OF CANADA, LOCAL 2; RE SHAWN DEVLINE ET AL ..... (July/Aug.) 480

Unfair Labour Practice – Intimidation and Coercion – Strike – Two applications were filed pursuant to section 96 of the Act arising from efforts by the CAEA to pressure Blue Man Toronto (BMT) into signing collective agreements with the unions – As part of its campaign, the CAEA issued a directive that its members refrain from performing or auditioning for BMT – Two members of the CAEA on honourable withdrawal status accepted employment with BMT and were subsequently expelled from membership – BMT and these two employees alleged in their applications that CAEA and the other named respondents pressured the employees to quit their employment with BMT, constituting unlawful intimidation and coercion – The employees claimed further that the responding parties called, authorized and/or attempted to cause an unlawful strike by pressuring the employees to quit their employment with BMT, and also, that CAEA violated section 85 by expelling them for refusing to engage in an unlawful strike – The Board dismissed the claim under section 76 on the grounds that the Act does not provide for nor protect a right of an employee to work for an employer contrary to the rules and/or directives of their union while retaining membership in the union at the same time – The Board also declined to grant relief under ss. 81 or 83 as the necessary elements of a "strike" as defined under section 1(1) of the Act were not made out – Finally, with respect to the alleged breach of section 85, the Board held that the directive by the CAEA and the subsequent expulsion from membership of the two employees did not disclose any violation of the Act, as the internal administration of a union constitution does not fall under ss. 81, 83 and 85 of the Act – Applications dismissed

BLUE MAN TORONTO, LLC ; RE CANADIAN ACTORS' EQUITY ASSOCIATION; KEN BURNS AND SUSAN WALLACE .....(Jan./Feb.) 4

Unfair Labour Practice – Practice and Procedure – The union complained that the employer had committed an unfair labour practice by refusing to allow its business representative access to the members on company property – Following the representative's attendance at the workplace, the employer had issued a notice to the union under the *Trespass to Property Act* requiring that access be sought in writing, subject to prosecution – The employer argued that the issue of access was contractual in nature and should be deferred to arbitration – The union countered by stating that the employer's actions in invoking a criminal process had elevated the dispute beyond the collective agreement – The Board held that the employer's reaction to the representative's alleged breach of the collective agreement on the union's representation rights and obligations under the Act was properly within the Board's jurisdiction – Employer's objection denied – Matter proceeds to hearing

UNIVERSAL SHOWCASE/idX COMPANY; RE CJA, LOCAL 1072 .....(Jan./Feb.) 108

Work Refusal – *Occupational Health and Safety Act* – OPSEU appealed an Inspector's decision not to make an Order requiring the Ministry of Transportation (MTO) to provide OC (pepper) spray to its Transportation Enforcement Officers (TEOs), arguing this was contrary to section 25(2)(h) of the *OHSA* – The Union also appealed the Inspector's decision not to treat a work stoppage as a work refusal under section 43 of the *OHSA* – The Board held that under section 25(2)(h), it is not every precaution which must be taken by an employer, but only reasonable precautions – Determining what is reasonable

involves balancing the benefit to be gained by taking the precaution against all other relevant factors, including the cost of the precaution and its effect on efficiency – The Board established that the magnitude and the frequency of the risk of assault were relevant considerations in determining whether the provision of OC spray was necessary – The circumstances under which OC spray could be used were exceedingly rare – Further, deploying OC spray contradicted the MTO disengagement policy – Accordingly, the Board concluded that the issuance of OC spray was outside the range of reasonable precautions that the employer was required to take – The Board exercised its discretion not to make any decision with respect to the work refusal – Five years had passed between the work refusals and the conclusion of the hearing – Given that the work refusals were primarily about whether OC spray should be provided, and the merits of the TEOs' complaints were dealt with by the inspectors in a relatively short period of time, there was little benefit to be gained by deciding the work refusal issue so long after the fact – Appeal dismissed

THE CROWN IN RIGHT OF ONTARIO (MINISTRY OF TRANSPORTATION), MINISTRY OF LABOUR; RE ONTARIO PUBLIC SERVICE EMPLOYEES' UNION ..... (Mar./Apr.) 196

Voluntary Recognition – Bargaining Rights – Construction Industry – Termination – In this application by the Painters to terminate the Plasterers' bargaining rights under s. 66, Syntex was bound to the Painters' Provincial Collective Agreement (which covered, among others, drywall tapers), when it obtained a subcontract from a general contractor bound to a collective agreement with the Plasterers' requiring that plasterers' work only be subcontracted to companies in contractual relations with that union – After commencing work and employing drywall tapers, Syntex entered into a voluntary recognition agreement with the Plasterers – The Board held that when there are actual persons employed in the bargaining unit, the union must demonstrate that it was entitled to represent those actual employees – Although the Plasterers' could not show they were entitled to represent the employees in the bargaining unit on the applicable date, the Board noted it still had discretion under s. 66 to decide whether to terminate the bargaining rights – The Board, following *Pencgal Trim*, found nothing to override the fundamental right of the employees of this particular employer to freely select their own union – The Board declared that the Plasterers' were not, at the time the voluntary recognition agreement was entered into, entitled to represent employees in the bargaining unit set out therein, and that the Plasterers' bargaining rights obtained by voluntary recognition with Syntex were terminated as of the date of the Board's oral decision – Application granted

R.P. SYNTEX WALLS SYSTEMS; RE IUPAT LOCAL 1891; RE OPERATIVE PLASTERERS' AND CEMENT MASONS INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA LOCAL 124 ..... (Nov./Dec.) 823

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